No. 99-1252

Supreme Court, U.S.
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In The

Supreme Court of the United States

FARREL GENE PRIDE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals Western District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Missouri Court of Appeals, in declaring that the "compelling governmental interest" test from *Sherbert v. Verner*, 374 U.S. 398 (1963) was overruled for all purposes by *City of Boerne v. Flores*, 521 U.S. 507, 138 L.Ed.2d 624 (1997), misstate the constitutional standard, established by this Court, applicable where a criminal defendant's free exercise rights under the First and Fourteenth Amendments and his Sixth Amendment right to compel the attendance of a material witness at trial conflict with the state's interest in holding discretionary court sessions after sundown on Friday and on Saturday, the Sabbath day of the defendant and the material witness?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Parents and subsidiaries: None.

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State v. Pride, 1 S.W.3d 494 (Mo. App. W.D. 1999)

JURISDICTION

The United States Supreme Court has jurisdiction of this action based upon 28 U.S.C. Section 1257(a) because Petitioner seeks review of a final judgment entered by the Missouri Court of Appeals, Western District, and Petitioner's Application for Transfer to the Supreme Court of Missouri, which is the highest court in the state of Missouri, was denied. Petitioner's right to free exercise of his religion under the First and Fourteenth Amendments to the United States Constitution and his right to compel the attendance of subpoenaed witnesses under the Sixth and Fourteenth Amendments to the United States Constitution were claimed before the trial court and at each level of the appellate courts in Missouri.

Petitioner was found guilty by a jury of two counts of forgery, class C felonies under Missouri law. Petitioner was sentenced to four years imprisonment on each count, said sentences to run consecutive to each other, and judgment was so entered against Petitioner on September 15, 1997 (Exhibit C, App. 46). Petitioner appealed to the Missouri Court of Appeals, Western District, which issued its opinion affirming the trial court's judgment on June 30, 1999 (Exhibit A, App. 1). Petitioner's Application for Rehearing and/or Transfer to the Missouri Supreme Court was denied by the Missouri Court of Appeals, Western District, on August 31, 1999 (Exhibit D, App. 49). Petitioner's Application for Transfer to the Missouri

Supreme Court was denied by the Missouri Supreme Court on October 28, 1999 (Exhibit E, App. 50).

CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONSTITUTION, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial of two counts of forgery in the Boone County, Missouri Circuit Court. The trial commenced on Thursday, July 24, 1997, and concluded on the evening of Saturday, July 26, 1997. Several months prior to the trial, the trial court had been advised of Petitioner's beliefs as a Seventh Day Adventist (App. 33-34; 40-41). On Thursday morning, after the jury was selected, but prior to the swearing in of the jury, Petitioner reminded the trial court that he was a Seventh Day Adventist and that his religious beliefs forbade participation in trial proceedings on his Sabbath day, from sundown Friday to sundown Saturday (App. 29-30). On Friday afternoon, July 25, 1997, after it became apparent the trial would not conclude that day, Petitioner moved for an adjournment until Monday, based upon the First and Fourteenth Amendments to the United States Constitution, to allow him and a material witness to observe their Sabbath as Seventh Day Adventists (App. 30-39). The trial court denied Petitioner's motion, stating that, because its schedule was full the next week, Petitioner's motion to adjourn was denied and the court informed the parties that it would hold trial Friday evening and Saturday (App. 39-42). As a result, Petitioner's material witness disobeyed the subpoena to appear at trial to testify on behalf of Petitioner and, although an order of body attachment was issued by the trial court, failed to appear at trial and testify on behalf of Petitioner (App. 42-45).

In addition to his trial motion, Petitioner raised this issue in his Motion for a New Trial (Exhibit F, App. 52), which was denied by the trial court (Exhibit G, App. 57); in his appeal to the Missouri Court of Appeals, Western

District (Exhibits H, App. 59; I, App. 64; L, App. 75; and M, App. 78); and in his Application for Transfer to the Missouri Supreme Court (Exhibit K, App. 68), both of which were denied (Exhibits A, App. 1; D, App. 49; and E, App. 50).

On appeal to the Missouri Court of Appeals, Petitioner argued that the trial court's decision to hold court on Saturday over the First Amendment free exercise objection of Petitioner was not the application of a "neutral, generally applicable law" but, rather, a "discretionary decision" of the sort which was still subject to the compelling governmental interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963). The Missouri Court of Appeals disagreed, stating that the *Sherbert* compelling interest test was, for all purposes, overruled by this Court in *City of Boerne v. Flores*, 521 U.S. 507, 138 L.Ed.2d 624 (1997).

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition for Writ of Certiorari because of the importance of determining whether the trial court's decision to hold court proceedings on the Sabbath day of a criminal defendant and a material witness over the defendant's request for adjournment constitutes interference with his right to free exercise of his religious beliefs under the First and Fourteenth Amendments to the United States Constitution, and violates his Sixth Amendment right to compel the attendance of witnesses at trial. In addition, the Petition should be granted because the Missouri Court of Appeals misstated the constitutional standard to be applied in resolving this conflict as set forth by this court in *Sherbert v. Verner*, 374

U.S. 398 (1963), *Employment Division v. Smith*, 494 U.S. 872 (1990) and *City of Boerne v. Flores*, 521 U.S. 507 (1997).

In *Sherbert v. Verner, supra*, this Court set forth what was essentially a two-part test in evaluating claims of this type: did the state's action substantially burden a religious practice, and, if so, was the burden justified by a compelling governmental interest, *Id.*, at 402-03. This Court refined this test in *Employment Division v. Smith, supra*, in which this Court declined to apply the "compelling governmental interest" test from *Sherbert* to a generally applicable criminal law but, rather, limited *Sherbert* to a "context that lent itself to individualized governmental assessment of the reasons for the relevant conduct," *Employment Division v. Smith, supra*, at 884. This Court also declined to apply the *Sherbert* test to a non-criminal law of general applicability in *City of Boerne v. Flores, supra*, which involved a decision by a local zoning authority to deny a building permit to a church in a historic preservation district. This Court in *Boerne* invalidated the Religious Freedom Restoration Act because Congress exceeded its power in enacting federal legislation which attempted to apply the "compelling governmental interest" test to virtually the entire range of governmental activity at every level of government. However, this Court did not completely overrule *Sherbert* in either of these later cases, and stated in both of them that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason", *Smith, supra*, at 884, *quoted* in *Boerne*, 138 L.Ed.2d at 635.

The Missouri Court of Appeals correctly cited *Boerne* for the proposition that the state does not have to show a

compelling governmental interest where neutral, generally applicable laws conflict with religious practices. However, the Court of Appeals erroneously concluded that *Boerne* rendered the compelling governmental interest test generally inapplicable (Exhibit A, App. 22). While this Court has narrowed the scope of the compelling interest test first set forth in *Sherbert*, the test has not been entirely obliterated: this Court in *Smith* and *Boerne, supra*, made clear that, when a system of individual exemptions is in place, the state may not refuse to extend that system to cases of religious hardship without compelling reasons.

In this case, there was a system in place to consider individual requests for variance from holding court on a Saturday. Holding court on a Saturday is the exception, not the rule in Missouri. Missouri Supreme Court Rule 44.01 excludes Saturdays and Sundays from the computation of court time, assuming that normal court days are Monday through Friday. The trial court exercised its discretion in holding extraordinary court sessions after sundown on Friday and on Saturday and in denying Petitioner's request for adjournment prior to sundown on Friday, but did so without undertaking the compelling interest test mandated by this Court under such circumstances. *Smith* and *Boerne* still stand for the proposition that when the government's discretionary interests collide with an individual's right to exercise his religious faith, the government must show a compelling interest. Neither the trial court nor the Missouri Court of Appeals undertook such an examination, let alone found such a compelling interest, because they found that the "compelling interest test" had been struck down by *Boerne*.

This case presents this Court with the opportunity to clarify an important question of federal law concerning the free exercise of religion and the related Sixth Amendment issue. Because the Missouri Court of Appeals misstated the correct constitutional standard as established by this Court to be applied in such situations, this Court should grant the Petition for Writ of Certiorari in this case.

CONCLUSION

This case involves important First and Sixth Amendment issues which need to be decided by this Court in order to provide guidance to lower courts in the future. The Court should grant the Petition for Writ of Certiorari in this case to clarify these issues and to resolve the conflict between the Missouri Appellate Court's decision in *State v. Pride* and this Court's decisions in *Sherbert,*

Smith and *Boerne*. *See also* Joint Suggestions of *Amici Curiae* attached in Exhibit N, App. 84.

Respectfully submitted,

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APPENDIX

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EXHIBIT A

[Seal]

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI	)	
Respondent,	)	**WD 54962**
	)	
vs.	)	**Opinion Filed:**
FARREL GENE PRIDE	)	
	)	**June 30, 1999**
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT
OF BOONE COUNTY
The Honorable Gene C. Hamilton, Judge

Before Presiding Judge James M. Smart,
Judge Forest W. Hanna and Judge Laura Denvir Stith

The appellant, Farrel Gene Pride, appeals his convictions for two counts of forgery and his sentence to two consecutive four-year terms of imprisonment. Mr. Pride argues that his convictions should be set aside because the trial court erred: (1) in denying his motion for judgment of acquittal because of insufficient evidence of his criminal intent; (2) in entering judgment against him based on Counts I and II because the indictments on those counts were allegedly insufficient; (3) in entering judgment against him on Counts I and II because he was unable to prepare a defense and was prejudiced because the indictments allegedly mixed the elements of two separate offenses and did not charge him with the offense of forgery; (4) in submitting Instructions Nos. 6 and 8 to the jury because both instructions failed to submit all the

elements of forgery; (5) in admitting into evidence a copy of a cashier's check which was allegedly unlawfully obtained by the State; (6) in admitting into evidence the testimony of Patty Wapshott in violation of the attorney client privilege; (7) in denying a request for continuance based upon his religious beliefs; (8) in admitting testimony regarding other instances of alleged criminal conduct; and (9) in admitting testimony from a State's witness who testified pursuant to an agreement with the State that the State agreed not to prosecute him in exchange for his testimony. Finding no merit to any of the claims, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Pride operated a company called Midwest Environmental Technologies (MET). In February 1997, Mr. Pride was being prosecuted on a charge of property damage in the first degree in Boone County, Missouri, for his alleged contamination of the City of Columbia's water treatment plant while his business, MET, was working on a contract project with the city. Mr. Pride was represented in this matter by an attorney, Milt Harper.

On February 10, 1997, Mr. Harper filed a pretrial motion to test the water treatment plant's soil and to obtain water samples to be used in investigating possible contaminants. The motion was granted on the condition that the parties agree to the terms and conditions of the testing. One of the requirements was that Mr. Pride would provide the City of Columbia with proof of adequate insurance prior to the testing, which was scheduled for March 25, 1997. Mr. Pride agreed to have proof of

commercial liability insurance for MET by March 21, 1997.

On March 21, 1997, Mr. Pride faxed a document to his attorney, Mr. Harper. James Kjar, an associate in Mr. Harper's office, received the fax. The fax included a cover sheet and a document which was a certificate of insurance. The certificate purported to be issued by Insurance Advisors of St. Louis (IASL), and contained effective dates of "5/27/95 through 5/27/96." Beneath these dates, however, was a type-written notation which stated, "Reinstated through 5/27/97." Mr. Kjar did not read the cover sheet that was faxed with the document, and instead took the copy of the insurance certificate to Mr. Harper, who instructed Mr. Kjar to take the certificate to the Boone County Prosecutor's Office. Mr. Pride testified he did not know the copy of the insurance certificate would be sent to the Prosecuting Attorney unaccompanied by the qualifying cover sheet, which Mr. Kjar did not read. Mr. Pride later produced a copy of a cover sheet which he claimed was the one originally faxed with the certificate of insurance. It stated, "Policy will be in effect Monday A.M. The [sic] have to give me an amount of money to wire Monday A.M."

On March 24, 1997, the day before the scheduled drilling, the Boone County Prosecutor turned the copy of the insurance policy over to the City of Columbia's Chief Engineer and Finance Department. Both departments were suspicious of the document and contacted IASL. Through IASL, Boone County learned that although IASL had covered MET with insurance on past occasions, their policy with MET expired in 1996 and had not been reinstated through March 27, 1997, as represented by the

typed writing on the faxed document of insurance. Neither had they indicated they could not tell him until Monday how much money it would take to reinstate the policy. To the contrary, they had already told him the amount needed to reinstate the policy and he had not paid it or indicated he was going to do so.

When Mr. Harper was informed that the certificate of insurance might not be authentic, he telephoned a service representative with IASL in the presence of Mr. Pride. However, Mr. Pride asked the representative not to disclose any information regarding the insurance policy and later told the representative that he would overnight a check and fax a copy of it to IASL to get the policy issued. Mr. Pride faxed IASL a copy of a cashier's check issued by the State Bank of Hallsville, along with a memo that stated, "Will mail check tomorrow."

No cashier's check ever arrived at IASL, and an original of the purported cashier's check in IASL's name faxed to it was never located. An employee of Mr. Pride testified that the purported cashier's check faxed to IASL was actually an earlier check that Mr. Pride had written to a company called Extech in July 1995. The employee further testified that Mr. Pride had told him that the prior payee's name on the check, as well as the amount, had been whited-out with IASL and the new amount printed over the old Extech designations. This altered check was then faxed to IASL. No check arrived in the mail thereafter, as promised in the fax.

On March 25, 1997, the Boone County Prosecuting Attorney and an investigator in the Prosecutor's office arrived at the IASL offices and served a *subpoena duces*

tecum upon Don Bratcher, an IASL agent, requesting the production of documents either then, or when Mr. Bratcher was called as a witness in Mr. Pride's prosecution. While at the IASL office, the Prosecutor found Mr. Pride's memorandum and a copy of the cashier's check faxed by Mr. Pride, and seized them. The March 25, 1997 drilling to test the soil and get water samples for Mr. Pride's property damage suit never occurred.

On March 26, 1997, both Mr. Harper and Mr. Kjar were called as witnesses for the State in the property damage case and in a not-yet-filed forgery case. Mr. Harper withdrew as Mr. Pride's counsel because of the conflict of interest created. Mr. Pride hired a new attorney, Stan Clay, to represent him.

On March 28, 1997, Mr. Pride was served with a search warrant at his MET office in Sturgeon, Missouri. During the search, Mr. Pride called Mr. Harper's office, but Mr. Harper was not available. Mr. Pride nonetheless asked Mr. Harper's secretary/paralegal, Patty Wapshott, what crime it would be if he took some incriminating evidence during the search while no one was watching. Ms. Wapshott told him that she did not think anyone would tell him that it would be fine to take the item, but that she could not give him legal advice. She advised him to call his new attorney, Mr. Clay. There is no evidence that Mr. Pride actually took any incriminating evidence after this telephone call.

On May 1, 1997, Mr. Pride was charged by indictment with two counts of the Class C felony of forgery, in violation of Section 570.090.1(4), RSMo 1994. Count I alleged that Mr. Pride transferred a copy of the altered

insurance certificate with the knowledge or belief it would be used as genuine, and Count II alleged that Mr. Pride transferred a copy of the altered check with the knowledge or belief it would be used as genuine.

The forgery trial began on July 24, 1997. Mr. Pride moved for judgment of acquittal at the close of the State's evidence and at the close of all the evidence, arguing that his conduct involved only future promises, which could not be the basis for a forgery conviction. The jury returned verdicts of guilty on both counts of forgery and the court sentenced Mr. Pride to two consecutive four-year sentences. Mr. Pride appeals.

II. STANDARD OF REVIEW

We defer to the trier of fact when reviewing the sufficiency of the evidence supporting a criminal conviction. ***State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993).** Our standard of review is whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. ***Id., citing, State v. Dulaney*, 781 S.W.2d 52, 55 (Mo. banc 1989).** We view the evidence in the light most favorable to the prosecution. *Id.*

III. SUFFICIENCY OF EVIDENCE OF FRAUD AS TO THE CERTIFICATE OF INSURANCE AND AS TO THE CASHIER'S CHECK

In his first point on appeal, Mr. Pride argues the trial court erred in denying his motion for judgment of acquittal because the evidence was allegedly uncontroverted

that his conduct did not involve intent to defraud, as is required by Section 570.090.1(4), under which he was indicted. Rather, he said, his conduct solely involved promises regarding future events, rather than misrepresentations of existing facts, and, therefore, could not support a finding of the requisite fraudulent intent.

Forgery is a crime which may be committed in several ways. The essential elements of forgery include a showing of a false making or other alteration of an instrument or a writing, fraudulent intent, and that the instrument is so made or altered so as to be apparently capable of effecting fraud. ***State v. Cockrell*, 858 S.W.2d 825 (Mo. App. 1993).** Intent to defraud, as an element of forgery, is a general intent and can be inferred from the act of forgery itself, if shown. ***State v. Johnson*, 855 S.W.2d 470 (Mo. App. 1993); *State v. Wakefield*, 682 S.W.2d 136 (Mo. App. 1984); *State v. Hogshooter*, 640 S.W.2d 202 (Mo. App. 1982).** An intent to defraud can be inferred from transferring a document purported to have been made by another, when the transferor knows it was not made as purported. ***Cockrell*, 858 S.W.2d at 827.**

Here, regardless whether the documents Mr. Pride transferred pertained to future events, the actual writings and instruments were themselves altered documents which Mr. Pride knew contained misrepresentations at the time he transferred them. These instruments were also capable of effectuating fraud if they had been relied upon by the parties to whom Mr. Pride transferred the documents. The fact that neither the prosecutor's office nor IASL acted to their detriment on the basis of the false information contained in the certificate of insurance or the cashier's check does not negate Mr. Pride's fraudulent

intent in sending the documents. Even though Mr. Pride testified he had no intent to commit fraud in sending either the altered cashier's check or the altered certificate of insurance, the jury had before it sufficient evidence from which it could infer that Mr. Pride had the intent to commit fraud because he sent both the cashier's check and the certificate of insurance knowing that both were altered and contained false information, and did so with the implied intent that they be relied on. Point I is denied.

IV. PLAIN ERROR IN PROCEEDING UNDER INDICTMENTS, AND INSTRUCTING JURY IN CONFORMITY WITH INDICTMENTS, WHICH ALLEGEDLY IMPROPERLY MIXED THE ELEMENTS OF FORGERY UNDER § 570.090.1(3) AND (4) AND WERE UNDULY VAGUE

In his next three points, Mr. Pride challenges the validity of the language utilized in the indictments and jury instructions regarding forgery. He essentially alleges that the State erroneously combined elements of Sections 570.090.1(3) and (4) in the indictments and jury instructions, and, as a result, did not actually charge him with or convict him of either crime or with any actual offense punishable under Missouri law.

Section 570.090.1 establishes different offenses which constitute the crime of forgery. It states:

> 1. A person commits the crime of forgery if, ***with the purpose to defraud,*** he
>
> (1) Makes, completes, alters or authenticates any writing so that it purports to have been made by another or at another time or place or in a numbered

sequence other than was in fact the case or with different terms or by authority of one who did not give such authority; or

(2) Erases, obliterates or destroys any writing; or

(3) Makes or alters anything ***other than a writing,*** so that ***it purports to have a genuineness,*** antiquity, rarity, ownership or authorship ***which it does not possess;*** or

(4) Uses as genuine, or possesses for the purpose of using as genuine, ***or transfers with the knowledge or belief that it will be used as genuine, any writing or other thing which the actor knows has been made or altered in a manner described in this section.***

§ 570.090.1 (emphasis added).

Mr. Pride was charged with two counts of forgery under Section 570.090(4) and his indictment was modeled after MACH 24.20.4, the pattern charge for the crime of "Forgery: Uttering as Genuine." That pattern charge permits use of the language "purports to have a genuineness" it does not possess in charging under subsection (4) of the statute for uttering a forged writing, even though that phrase is only specifically found in the offense of forgery described under subsection (3) of the statute involving items other than writings, and is not specifically restated in subsection (4). Following this pattern indictment form, Mr. Pride's indictment set forth the following charges:

> **COUNT I:** The defendant, with the purpose to defraud, transferred with the knowledge or belief that it would be used as genuine, a copy of a certificate of insurance issued by Insurance Advisors of St. Louis, and at that time knew that this ***writing*** had been altered ***so that it purported to have a genuineness which it did not possess,*** and
>
> **COUNT II:** The defendant, with the purpose to defraud, transferred with the knowledge or belief that it would be used as genuine, a copy of a bankdraft, dated March 24, 1997, numbered 11356, made payable to Insurance Advisors, and at that time knew that this ***writing*** had been altered ***so that it purported to have a genuineness which it did not possess.***

(emphasis added).

Mr. Pride, accordingly, now argues that his indictment was insufficient because the language used by the State in the indictment combined the elements of Section 570.090.1(4), ***that the defendant transfer with knowledge or belief that the document would be used as genuine, a writing which he knows to be made or altered in a manner described in the statute,*** with the elements of 570.090.1(3), which includes the language that the forger ***makes or alters anything other than a writing so that it purports to have a genuineness . . . which it does not possess.*** Mr. Pride asserts that this combination of elements from subsections (3) and (4) created an indictment which failed to set forth the essential elements of the crime with which he was charged under subsection (4), because the indictment also contained language from a

separate offense under subsection (3) only involving anything other than a writing, whereas his alleged crime involved only writings. He argues the indictment was thus insufficient because: (1) it thereby failed to charge an offense punishable under Missouri law; and (2) it was so vague that it would preclude him from claiming double jeopardy if he were charged again following acquittal.

In support of his argument, Mr. Pride cites to ***State v. Parks*, 969 S.W.2d 870 (Mo. App. 1998)**, in which the Eastern District reversed a forgery conviction, holding that the inclusion of the "purports to have a genuineness" language of subsection (3) in an instruction under subsection (4), conflicted with the substantive law of the forgery statute by improperly mixing the two sections, and was erroneous. ***Parks*,** however, addresses the test for a challenge to the sufficiency of properly objected to jury instructions rather than the test for the sufficiency of an indictment, and, thus, is not dispositive here.

Instead, the test for the sufficiency of an indictment or information is "whether it contains all the essential elements of the offense as set out in the statute creating the offense." ***State v. Hyler*, 861 S.W.2d 646, 649 (Mo. App. 1993)**. To be sufficient, the indictment must also clearly advise the defendant of the facts constituting the offense so that he may prepare an adequate defense and prevent retrial on the same charges in case of an acquittal. ***Id.*** If a statute provides that a crime may be committed in several different ways or by differing means, the indictment must state the way in which it was committed. ***State v. Murphy*, 787 S.W.2d 794, 796 (Mo. App. 1990)**.

Where, as in this case, the charged party does not raise an issue concerning the validity of his indictment before or during the trial, but raises it for the first time on appeal, then review of the alleged error is far more limited than would otherwise be the case. The charged party must not only prove that there was an error in the indictment, but also:

> [T]hat (1) it does not by any reasonable construction charge the offense of which the defendant was convicted or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of acquittal are prejudiced. In either event, a defendant will not be entitled to relief based on a post-verdict claim that the information or indictment is insufficient ***unless the defendant demonstrates actual prejudice.***

State v. Parkhurst, **845 S.W.2d 31, 35 (Mo. banc 1992)** (emphasis added). Therefore, we examine only for actual prejudice. Because we find no such prejudice, we need not address whether we would have read subsection (4) so narrowly as did ***Parks,*** or would instead have agreed with the drafters of the model indictment forms that subsection (4) was intended to allow indictment for transfer of a writing that purports to have a genuineness it does not have.

A defendant suffers actual prejudice only if the indictment was so deficient that the defendant was not placed on notice as to what crime he was being charged with, or was so lacking in clarity that the defendant was unable to properly prepare a defense. ***State v. Briscoe,*** **847 S.W.2d 792 (Mo. banc 1993).** Mr. Pride argues he was

clearly prejudiced because the indictment failed to contain an essential element of the crime of forgery and failed to specify the manner or means in which he allegedly committed the forgery, and instead stated that he allegedly transferred a copy of a writing which "purported to have a genuineness which it did not possess." He conclusorily suggests that this hindered his defense and could preclude him from pleading double jeopardy should he later be indicted under Section 570.090.1(4).

We disagree. Mr. Pride has failed to identify any aspect of his defense that was in fact hindered by the variance of the indictment from the statute (assuming it does vary). Indeed, he did not even notice the alleged variance until after trial. Moreover, a review of the record reveals that his defense was based on lack of intent, and that it would have been no different had the indictment used the language set out in Section 570.090.1(1) or (2) rather than the slightly different language contained in Section 570.090.1(3). Finally, it is abundantly clear from the facts and the record exactly what activity was alleged to constitute forgery and exactly what section of the law was alleged to be violated – Section 570.090.1.(4). That was the section specifically cited in the indictment, and that is the section under which the case was submitted in the jury instructions. Mr. Pride could not again be prosecuted under that section. No double jeopardy concern arises. For these reasons, we find no plain error here.

Mr. Pride next argues the court erred in submitting to the jury verdict-directing instructions based upon MAI-CR No. 324.20.4, because, like the indictments, the instructions improperly combined elements of subsections 570.090.1(4) and (3). Mr. Pride again relies on the

holding in *Parks* as the basis for his challenge. In *Parks*, as noted, a forgery conviction was reversed because the MAI-CR instruction submitted by the trial court was found to conflict with the substantive law of the forgery statute in that it combined elements of two separate offenses. *Parks*, 697 S.W.2d 870.

Unlike in *Parks*, however, here Mr. Pride failed to raise an objection to the instructions at trial.[1] Thus, Mr. Pride acknowledges that this issue has not been properly preserved for appeal, and requests that this court review the instructions for plain error. Under Rule 30.20, plain error review is mentioned only if the Court finds the error affected substantial rights, and plain error will result in reversal only if this Court finds it resulted in manifest injustice or a miscarriage of justice. In this context, Mr. Pride must establish that the judge so misdirected or failed to instruct the jury that it is apparent that the instructional error affected the jury's verdict. *State v. Brown*, 913 S.W.2d 919, 921 (Mo. App. 1996); *State v. Doolittle*, 896 S.W.2d 27, 29 (Mo. banc 1995).

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[1] Although the holding in *Parks* was based upon the same instruction utilized in the present case, the objection to the instructional error was timely raised in *Parks* during the instruction conference. Therefore, because the claim of error was preserved in *Parks*, it received more than plain error review. *Parks*, 696 S.W.2d at 873. Because of the different level of review in this case, the *Parks* analysis is not comparable to this situation. Thus, we need not address whether we agree with *Parks'* narrow interpretation of the scope of subsection (4) because, even if the approved jury instructions are not correct based on *Parks*, the only applicable issue here is whether the variance in the instructions, regardless of their validity, ultimately affected the outcome of the jury verdict.

We find no plain error here. There was sufficient evidence before the jury that Mr. Pride possessed the documents, knew they had been altered, and transferred the documents despite his knowledge that they were false. Assuming use of the wording that Mr. Pride transferred either document while it "purported to have a genuineness that it did not possess" rather than that it had been altered "so it purported to have been made by another" was error, under these facts, the jury could not have been confused or misdirected, and we therefore decline to give plain error review.

V. IMPROPER USE OF SUBPOENA DUCES TECUM

Mr. Pride challenges the basis for the admission of a copy of the cashier's check that he faxed to IASL by asserting the State improperly used a *subpoena duces tecum* served on Mr. Bratcher at the IASL office to unlawfully obtain possession of the copy.

A *subpoena duces tecum* may command the attendance of non-party witnesses at court proceedings, as well as command the person to whom it is directed to produce books, papers, documents, or other objects designated therein. **Rule 26.02.** This rule is not intended to be a rule of discovery, but is instead a means of enforcing the production of documents or objects at deposition or trial that are material and relevant to trial issues. ***State v. Engberg*, 377 S.W.2d 282 (Mo. 1964).**

Mr. Pride argues the prosecution improperly used the *subpoena duces tecum* as an illegal search warrant rather than as a means to produce evidence for trial. Mr. Pride cites to ***State v. Ek*, 834 S.W.2d 828 (Mo. App. 1992),**

which found a *subpoena duces tecum* was used improperly because it failed to give information as to the place, time, and date of the deposition to the party being served the subpoena and being ordered to produce documents. The court found that the lack of this information established that the prosecutor was not using the subpoena for the purpose of notifying the other party or the witnesses of the deposition, but instead as an improper *ex parte* discovery tool.

Here, however, contrary to Mr. Pride's argument, the prosecution did include the date, time, and location of the proceeding at which Mr. Bratcher could alternatively produce the documents, and the record is devoid of other evidence of bad faith in the prosecutor's use of the subpoena.

The State further points out that, even if the subpoena were being used improperly, Mr. Pride has no standing to challenge the seizure of the copy of the check because this copy was a record of IASL, not of Mr. Pride. To have standing to challenge the seizure of personal property by a government agent, the challenger must have a privacy right in the items seized. ***State v. Brown*, 689 S.W.2d 63 (Mo. App. 1985)**. Here, we agree Mr. Pride had no privacy rights in preventing recovery from a third party of a fax simply because he was the one who originally had sent the fax to the third party. Thus, he has no right to challenge the admission of the copy of the check obtained from the third party pursuant to the subpoena.

VI. VIOLATION OF ATTORNEY-CLIENT PRIVILEGE

Mr. Pride challenges the admission of testimony given by Patty Wapshott, a paralegal/secretary for his former attorney, Mr. Harper, regarding a telephone conversation she had with Mr. Pride after Mr. Harper had withdrawn as Mr. Pride's attorney and after Mr. Pride had already hired a new attorney to represent him.

The attorney-client privilege extends to confidential communications between an attorney and his client (and, at times, employees of the attorney) regarding the representation of the client. ***State v. Timmons*, 956 S.W.2d 277 (Mo. App. 1997).** In order to invoke this privilege, the party asserting it must show: (1) the existence of an attorney-client relationship at the time of the interaction or communication, and (2) that an attorney-client relationship existed with regard to the subject matter of the communication or incident. ***State v. Smith*, 979 S.W.2d 215 (Mo. App. 1998).** If either of these factors is absent, the privilege does not apply.

Here, the court permitted Mr. Harper to withdraw as Mr. Pride's attorney on March 26, 1997, and Mr. Pride immediately hired a new attorney, Stan Clay, as his replacement. Two days later, on March 28, 1997, Mr. Pride's office was being searched by the police. Mr. Pride argues that he attempted to contact both Mr. Clay and Mr. Harper for advice during the search of his office, but was unsuccessful. Mr. Pride, however, did speak with Ms. Wapshott, Mr. Harper's paralegal/secretary, and claims that it is this conversation that is protected by the attorney-client privilege.

Assuming, without deciding, that the attorney-client privilege would have extended to a conversation between Mr. Pride's attorney's secretary and himself in this context, at the time Mr. Pride spoke with Ms. Wapshott, he no longer had an attorney-client relationship with Ms. Wapshott's employer, Mr. Harper. Moreover, although there are limited circumstances in which courts have permitted the extension of the attorney-client privilege to conversations even though a formal attorney-client relationship does not exist, courts generally limit this to situations in which the defendant ***reasonably believes*** the attorney is representing him. ***State v. Longo*, 789 S.W.2d 812, 816 (Mo. App. 1990).** Here, Mr. Pride knew his attorney-client relationship with Mr. Harper had ended, and indeed Mr. Pride already had hired a new attorney to represent him. Furthermore, during his conversation with Ms. Wapshott, she reminded him that Mr. Harper no longer represented him and that, if he needed advice, he was to contact his new attorney, Mr. Clay. Thus, there is absolutely no basis, on these facts, on which Mr. Pride could have reasonably believed Mr. Harper was still representing him in the matter. The attorney-client privilege, therefore, does not apply.

VII. CONTINUANCE DUE TO RELIGIOUS BELIEFS OF DEFENDANT AND WITNESS

Mr. Pride contends the trial court violated his right to the free exercise of his religion under both the First Amendment of the United States Constitution and Article I, Section 5 of the Constitution of the State of Missouri, by denying his request to adjourn the trial proceedings from

Friday, July 25, 1997, to the following Monday, July 28, 1997, in order to accommodate his religious beliefs and practices.

The First Amendment to the United States Constitution mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " **U.S. CONST. amend. I.** This provision binds the states through the Due Process Clause of the Fourteenth Amendment. ***Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed.2d 1213 (1940).** The Free Exercise Clause precludes all governmental regulations on beliefs, but the government may, under certain circumstances, impinge on a individual's actions in accordance with those beliefs in exercising the power to proscribe conduct. ***See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 890, 110 S.Ct. 1595, 1606, 108 L.Ed.2d 876 (1990).** The State of Missouri has a similar clause in Article I, Section 5, which provides:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

MO. CONST. Art. I, § 5. The significance of the right to the free exercise of religion is not diminished by an individual's status as a defendant in a criminal proceeding. ***U.S. v. Fischer*, 571 F.Supp. 1236 (S.D.N.Y. 1983).**

Here, the court had been informed in a conference a few months prior to the trial (when Mr. Pride was represented by Mr. Harper) that Mr. Pride was a Seventh Day Adventist. At trial, Mr. Pride was represented by his new attorney, Mr. Clay. At the beginning of voir dire, the court informed the jury panel of the possibility that the trial would go into Saturday, but told the panel that the case should be "completed one way or the other by [Friday night], and if not by [Friday night], by sometime on Saturday. The court proceeded with voir dire and then recessed for jury selection. During the recess, while the jury was being selected, Mr. Pride pointed out to Mr. Clay that he was a Seventh Day Adventist and that he would have a problem if the trial were to be held on Saturday. After the recess, but before the jury was sworn in, Mr. Clay reminded the judge of Mr. Pride's religious belief that his Sabbath is from sundown Friday to sundown Saturday, and of the potential conflict with the trial schedule. The court stated he wished it had been brought to his attention that morning before he told the jury that the case may go on to Saturday, but delayed making a ruling until it became clear whether or not it might be possible to conclude trial by sundown Friday.

By Friday afternoon the court suspected the case would not be complete by sundown Friday. The court again expressed his disgust that no one had reminded him while he was talking to the jury panel about how long the case was going to take that someone might not

be able to try this case on Saturday. Before the court ruled on the issue of holding court on Saturday, Mr. Pride took the stand and testified under oath about his religious beliefs. He testified that he was a Seventh Day Adventist and that his Sabbath was observed from sundown Friday until sundown Saturday. He also testified that his involvement in any secular activity during the Sabbath would violate his religious beliefs. He further stated that he believed his participation in the trial, if it were to be continued on Saturday, would be purely secular and against his moral conscience. He requested that, if the trial were not concluded by sundown Friday, the court not hold court Saturday so that he could observe his Sabbath.

When it became evident that trial would not be concluded by sundown Friday, the judge ultimately took up and denied the motion to adjourn the trial until the following Monday. In so ruling, he stated that in making his decision he weighed Defendant's desire not to hold trial on Saturday with: (1) the fact that Defendant failed to mention the potential conflict until after the jury had been selected, even though the potential for a Saturday trial was discussed earlier in the proceeding, and the court asked if there would be any conflicts, and (2) the fact the judge had a law day on Monday, bench trials set for Tuesday, and a jury trial on Wednesday of the following week, and so would have to put off the trial even further or else delay those proceedings.

Mr. Pride states that the court's refusal to adjourn the trial until the following Monday essentially required Mr. Pride to make a Hobson's choice: he could either (1) follow his moral conscience and exercise the right to

observe his Sabbath by staying home and avoiding the secular trial, or (2) appear in court on Saturday to exercise his right to be present at trial. Mr. Pride states he decided to appear in court on Saturday, in violation of his religious beliefs, because he thought it was necessary and vital to his defense that he be present at the trial in order to exercise his right to testify on his own behalf.

On appeal, Mr. Pride now argues that the requirement that he violate his beliefs by appearing at trial was constitutional error which entitles him to a new trial. In support, he cites principally to ***People v. Gilliam*, 626 N.Y.S.2d 245 (App. Div. 1995).** That case held that a trial court erred in forcing a Muslim minister to chose [sic] between attending trial on a Friday, his Sabbath day, or leading prison worship services. In so ruling, ***Gilliam*** applied a balancing test, requiring the state to show that it had a compelling state interest in holding court on Friday despite defendant's religious beliefs. The state was unable to show such an interest in that case. ***Id.***

The balancing test used in ***Gilliam*** was consistent with that required by the Religious Freedom Restoration Act of 1993 (RFRA), **42 U.S.C. § 2000bb *et seq.* (1993).** That Act was, however, invalidated by the United States Supreme Court in ***City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).** In ***Boerne*,** the Supreme Court held that states need not show a compelling state interest in order to apply neutral, generally applicable laws to religious practices. ***Id.*** Thus, if a court reasonably exercises its discretion in applying such

neutral laws, then it has not violated a defendant's First Amendment rights.[2]

Here, the judge carefully considered Defendant's concerns and determined to nonetheless hold court on Saturday because of Defendant's delay in raising this issue and because it was the only time he could hold court in light of other scheduled cases. While the judge could have reached a different conclusion – for instance, he could have determined to reset his schedule for the following week and to put off the trial scheduled for that week – we cannot hold that he abused his discretion in failing to do so.

In addition, as to Mr. Pride's claim that the continuance prejudiced his defense because one of his witnesses, also a Seventh Day Adventist, failed to honor her subpoena and appear for trial on Saturday, we find that no prejudice resulted. The defendant proffered that he expected the witness, Ms. Schnell, to testify that while she was employed by MET, she made the typed memorandum notation on the certificate of insurance which states, "Reinstated through May 27, 1997" at the direction of David Rachell. This information, however, was essentially testified to by Mr. Rachell, another MET employee. Mr. Rachell testified that after he filled out an application

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[2] Although Mr. Pride also brings a claim under the Missouri Constitution, the question of whether or not Missouri would adopt the United State [sic] Supreme Court's interpretation of the Free Exercise Clause in ***Boerne*** in interpreting the Missouri Constitution's free exercise provision, need not be decided today, as Mr. Pride has failed to discuss any difference in the Missouri and United States Constitutions in his brief.

for insurance through IASL, he had the secretary, Ms. Schnell, at his direction, type on the old certificate of insurance a statement that it was reinstated through May 27, 1997. Ms. Schnell's testimony would have been merely cumulative on this issue, and thus, unnecessary. Therefore, even if the trial court should have granted the continuance, Mr. Pride fails to demonstrate any prejudice from the denial of the continuation on this basis.

VIII. EVIDENCE OF PRIOR FORGERIES

Mr. Pride argues the trial court erred in permitting a witness for the State to testify that on two prior occasions Mr. Pride had falsified insurance certificates that he provided to MET customers. Mr. Pride argues the testimony was inadmissible because there is no relationship between these two instances and the crimes charged and because the evidence was extremely prejudicial.

Evidence of uncharged crimes, wrongs, or acts is generally inadmissible for the purpose of showing the propensity of the defendant to commit such crimes. ***State v. Morrow*, 968 S.W.2d 100, 107 (Mo. banc 1998).** Evidence of other crimes or bad acts is admissible, however, if it is logically and legally relevant and tends to establish motive, intent, absence of mistake or accident, or a common plan or scheme. ***Id.*; *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993).** Evidence is logically relevant if it has some legitimate tendency to establish the accused's guilt of the charges for which he was on trial, such as when it tends to establish motive, intent, the absence of mistake, a common scheme or plan, or the identity of a person

charged with the commission of the crime. ***State v. Clover*, 924 S.W.2d 853 (Mo. banc 1996).** Evidence is legally relevant if its probative value outweighs its prejudicial effect. ***Id.***

In this case, Mr. Pride was charged with two counts of forgery, each requiring proof of a purpose to defraud. At trial, Mr. Pride argued that his acts of transferring copies of altered documents merely consisted of promises as to future events, and thus, lacked any purpose to defraud. He denied any intent to defraud and denied an intent to falsify insurance certificates in order to avoid purchasing liability insurance. Based on this defense, it cannot be said the evidence that Mr. Pride had previously falsified insurance certificates to avoid purchasing liability insurance was not logically relevant. Most basically, the evidence of separate falsified insurance certificates tends to prove that the forgery for which Mr. Pride was on trial was not a mistake, that Mr. Pride had a motive and actual intent to commit fraud in transferring these documents, and that these acts had some relationship to a general criminal enterprise in Mr. Pride's business. Thus, this evidence had a legitimate tendency to establish Mr. Pride's guilt of the crimes charged.

The evidence was also legally relevant. Legal relevance requires a balancing of the probative value of the evidence against its prejudicial effect on the jury. ***Clover*, 924 S.W.2d at 856.** This determination rests within the discretion of the trial judge, and the judge is afforded a great deal of deference in making such determination. ***Id.*** Considering the relevance of the fact that Mr. Pride denied any knowledge or intent that the documents he transferred might be relied upon, we cannot say that the

court abused its discretion in admitting the evidence of the prior altered documents.

IX. ERROR IN EXCLUDING TESTIMONY OF WITNESS PROMISED LENIENCY IN RETURN FOR TESTIMONY

Mr. Pride argues that a promise by the prosecutor that he would not prosecute a witness for the State, Edward Dean, for crimes in which he "acted in concert" with Mr. Pride, only if the witness implicated Mr. Pride, is void as against public policy. Without citing authority, Mr. Pride argues such agreements are void because the act of giving immunity to a witness, or entering into any agreement for favorable testimony, is tantamount to "buying" testimony. He argues that, if a defendant cannot engage in conduct of soliciting favorable testimony in exchange for something of value, then the State must also be prohibited from such conduct. Mr. Pride further asserts the policy interest of the State in preventing perjured testimony is an additional reason to prohibit such agreements.

However, Mr. Pride failed to object to Mr. Dean's testimony at trial and the failure to timely object to the admissibility of evidence waives any right to challenge the admissibility of the evidence on appeal. ***State v. Weston*, 926 S.W.2d 920 (Mo. App. 1996).** In addition, the subsequent enactment of Section 491.205, RSMo Cum. Supp. 1997, which authorizes the granting of immunity to prosecution witnesses in criminal proceedings, undercuts Mr. Pride's public policy arguments. ***See also, U.S. v. Singleton*, 165 F.3d 1297 (10th Cir. en banc 1999), *cert.***

denied, No. 98-8758, ___ U.S. ___, 1999 WL 185874 (U.S. Jun. 21, 1999) (court en banc rejected similar argument and found agreement with prosecutor was not against public policy). No cases are cited which support the result argued for by Mr. Pride, and we find no merit to the argument here.

For the reasons stated above, the judgment is affirmed.

/s/ Laura Denvir Stith
LAURA DENVIR STITH,
Judge

Presiding Judge James M. Smart and Judge Forest W. Hanna, concur.

EXHIBIT B

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, Respondent,	)	
vs.	)	WD No. 54962
FARREL GENE PRIDE, Appellant.	)	

IN THE CIRCUIT COURT OF MISSOURI
BOONE COUNTY, DIVISION I
Honorable Gene Hamilton, Judge

STATE OF MISSOURI, Plaintiff,	)	
vs.	)	Case No. CR0197-053923
FARREL GENE PRIDE, Defendant.	)	

RECORD ON APPEAL – TRANSCRIPT

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* * *

[p. 462] THE COURT: Are you all ready to proceed? Have you got the prosecutor up here?

MR. ROSS: I'll go look for him, Judge.

THE COURT: She's still making copies, too.

MR. ROSS: Oh, okay.

MR. CLAY: Did you want to take up the Seventh Day Adventist before the noon hour?

THE COURT: No need of doing that now. If we get finished by tomorrow night, it's not a problem.

MR. CLAY: I wanted to do it on the record.

THE COURT: Yeah. Well, I'll let you put it on the record.

MR. CLAY: I didn't know if you meant now.

THE COURT: Mr. Clay, you said you wanted to make a record as to –

MR. CLAY: Clay just for the record, to inform the court, since you've indicated this case could go into Saturday morning, my client is a Seventh Day Adventist, and his sabbath is from sundown Friday to sundown Saturday.

THE COURT: Well, I don't think there's anything for me to rule on at this point in time.

MR. CLAY: I'm just informing the court.

THE COURT: I realize I think somewhere back on the record, when Mr. Harper still represented, this was

brought to my attention at some point in time. There have [p. 463] been a lot of cases that I have had under the water since then, and I wish to goodness somebody had brought it to my attention this morning before I'm telling the jury that we may go on Saturday.

MR. CRANE: What relief are you seeking?

MR. CLAY: I'm informing the court that he's a Seventh Day Adventist and his sabbath is such that he is supposed to stay home from sundown Friday to sundown Saturday.

MR. CRANE: So there's no motion for me to comment on?

MR. CLAY: No, there's no motion.

THE COURT: Let's bring the jury in.

* * *

[p. 1013] FARREL PRIDE,
being first duly sworn, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. ROSS:

Q. In a loud and clear voice, state your name.

A. Farrel Pride.

Q. You are the defendant in this matter?

A. Yes.

Q. What is your – do you have a religious belief?

A. Yes. I am a Seventh Day Adventist.

Q. And how long have you been a Seventh Day Adventist?

A. Since I was born; 28 years.

Q. Is that how you were raised?

A. Yes, it is.

[1014] Q. And what is the sabbath for, or is there –

THE COURT: Hold it down, please.

Q. Is there a day which is observed by yourself and other Seventh Day Adventists as a sabbath or holy day?

A. Yes. We observe the seventh day, according to the Fourth Commandment.

Q. What day is that?

A. Saturday.

Q. When does your – the observation of your sabbath commence?

A. At sundown Friday evening.

Q. And when does it end?

A. Sundown Saturday evening.

Q. Have you ever in your life worked or not observed the sabbath?

A. I have not.

Q. Okay. Are you – You're familiar with the witnesses in this case?

A. Yes.

Q. And is your wife, Valerie Pride, also a Seventh Day Adventist?

A. She is.

Q. Okay. And has she expressed to you her position on whether or not she – Strike that. Is she also practicing with respect to observing the sabbath from Friday at sundown [p. 1015] until Saturday at sundown?

A. Yes. We take our children to church every week.

Q. Okay.

MR. ROSS: Excuse me, guys. I'm sorry.

Q. According to your religious belief, do you believe that attending this court tomorrow, on Saturday, would be a violation of your religious beliefs?

A. It's a violation of the Fourth Commandment.

Q. How so?

A. It's a secular activity.

Q. Is that something, by your understanding of your – the teachings of your church, to be an improper activity on the sabbath?

A. Yes, it is.

Q. Okay. Earlier I saw your wife in tears in the hallway. Was that in connection with this discussion we were having?

A. Yes, it was.

Q. Okay. Do you believe you would also like to appear and it's necessary for your defense to appear in court throughout the entire trial of this matter?

A. Yes, I believe it is.

Q. Okay. Had you informed Milt Harper, your prior attorney in this – I'm sorry, in the property damage case, which has been pending for some time, of your concern about [p. 1016] appearing in court on Saturdays?

A. Yes, I did.

Q. And to your understanding, had that position been conveyed to this court?

A. I believe I was present when it was taken up with this court.

Q. And in fairness to the court, that was some time ago, correct?

A. That's correct.

Q. And it was not again brought to the court's attention until after the court had sworn in the jury in this matter, correct?

A. I believe that's true.

Q. Okay.

A. I wasn't aware – I'd like to clarify that – until he was working with the jury, that he said he was going to go on Saturday. I was told that in the last six months this court had almost never gone on Saturday, except for a couple of homicide cases.

Q. That was a question in a conversation that I participated in along with Mr. Stan Clay, who provided that information to you, correct?

A. That's right. That's right.

MR. ROSS: Judge, that's all I've got from this witness.

[p. 1017] THE COURT: Mr. Crane.

* * *

CROSS-EXAMINATION

BY MR. CRANE:

Q. Mr. Pride, is it your position that you understand the court has said we are going to complete this trial by going into the evening time and into tomorrow?

A. I haven't understood the court to say that yet.

Q. You haven't understood that the court has made a decision that this trial will proceed into this evening and will be concluded tomorrow, on Saturday?

A. No. I think he's considering not doing that. That's what this motion is about, isn't it?

Q. Well, no.

MR. CRANE: Judge, I thought this was making a record.

THE COURT: Well, I've indicated that I wanted some kind of authority if I was going to make a ruling that we weren't going to go on Saturday. And I've now been furnished with authority, and I haven't made that

ruling final yet. And I am allowing evidence to be presented, whatever they want to do before I make my ruling.

MR. CRANE: I was not aware of that, Judge.

BY MR. CRANE:

Q. Okay. Well, is it your testimony that, in the [p. 1018] event the court does proceed this evening and tomorrow, that you will not attend the trial?

A. I believe that's correct.

Q. But you're not sure?

A. It would be a violation of my conscience for me to come to trial on Saturday.

Q. No, I understand that. But have you made a decision that you will not attend the trial?

MR. ROSS: Well, and let me object here. And I'll caution my client that I have not counseled you on this decision yet. And I would ask before that final decision is made, input from Mr. Clay and myself be – and I don't want you making a decision rashly without our counsel at this time.

THE WITNESS: I understand that.

MR. ROSS: Okay.

THE COURT: Okay. Any other questions?

MR. CRANE: Well, what's the ruling on the objection?

THE COURT: Were you making an objection to the question?

MR. ROSS: Actually, I wasn't making an objection. I was cautioning my client.

THE COURT: You may answer the question.

A. Well, I'd like to speak with my attorneys before I [p. 1019] answer that question. I may need some legal advice. It's a violation of my conscience and my constitutional rights to be required to be here tomorrow.

Q. So I understand that's your position?

A. I would like to know, if we have to go all day tomorrow and we don't get done, if we'll go on Sunday.

Q. Here's the question I have for you. Have you made a decision – and it sounds like you haven't yet, you want to confer with your attorney – as to whether or not you would attend the trial, you know, in the event it goes past, you know, the parameters that your beliefs provide, or not? And, I mean, isn't it true that you haven't yet made a decision, because you have to talk –

A. I haven't been faced with that issue, yes, sir.

Q. So you haven't made a decision?

A. I'm making a request of the court to consider my religious beliefs and grant me the opportunity not to be here on Saturday. And that hasn't been ruled on yet, so I haven't made a decision, and I won't until that time.

Q. Okay.

MR. ROSS: Let me pose a hypothetical to you, then.

THE COURT: Are you finished with your questioning?

MR. ROSS: I'm sorry.

[p. 1020] BY MR. CRANE:

Q. With Respect to other witnesses that you've indicated may be called in this case in the defense portion of it, you've indicated that a number of those individuals are also Seventh Day Adventists?

A. That's correct.

Q. And have – have they – Have you been informed by them that they would not attend and testify on your behalf?

A. I have been.

Q. By each and every one of them?

A. By a couple of them.

MR. ROSS: I have information from Mr. Haws, and which was confirmed by Mr. Eufinger, that a State's witness, Ms. Schnell, is not going to appear on Saturday, and she's under a State's subpoena. We would recall her on Saturday. And she's not coming. And Mr. Haws brought that to the attention – That he learned first and then brought it to the attention of my partner, who confirmed it by phone.

THE COURT: Finish your questioning. Let's get on with this.

BY MR. CRANE:

Q. That's my question. Some of them said they would and some said they won't?

A. I haven't talked to all of them. No one has said they would. I just haven't talked to all of them.

[p. 1021] THE COURT: Judge, that's all.

THE COURT: Any redirect?

* * *

REDIRECT EXAMINATION

BY MR. ROSS:

Q. Okay. I'm – Without any advice from Mr. Clay or myself, if the court orders that there is going to be a trial tomorrow, are you going to appear?

MR. CRANE: Now, Judge, he just wouldn't answer that question, or said he hasn't made a decision.

THE COURT: Let's see if he'll answer it this time around. It's not a decision that you have to make now, Mr. Pride.

MR. ROSS: That's true. We can talk.

THE WITNESS: I think I'd like to see what consideration the court grants me.

THE COURT: Any other questions?

MR. ROSS: Not from this witness, Judge. And I – There might be one other witness.

THE COURT: There's going to be another witness? We're going to have to get the jury back in. I thought you said a couple of minutes.

MR. ROSS: I did, but I would like a perspective from Valerie Pride, who is a witness.

THE COURT: We'll take that up while the jury's [p. 1022] eating, then, and while we're not eating.

Bring the jury in.

* * *

[p. 1053] (THE FOLLOWING PROCEEDINGS WERE HAD IN THE COURTROOM OUT OF THE PRESENCE OF THE JURY:)

THE COURT: Okay. Additional evidence now, Mr. Ross.

MR. ROSS: Thank you. Your Honor, I – We're not going to call anybody else. It's the same thing you're going to hear from everybody. It would just be more time, and so –

THE COURT: Okay. Anything to say about this, Mr. Crane?

MR. CRANE: Yes. Judge, I haven't had an opportunity to review the case law on this matter. My position is basically what was articulated earlier by the court. This case has been set for an extended period for this date, that numerous witnesses were identified by both sides, and I'm confident that the defendant was made very aware of [p. 1054] that.

The issue, as I recall, of the length of the trial was discussed before the day of voir dire, during motions. The court, I think, was inquiring as to how long we thought it would take. You know, the record will reflect that. I don't have – that certainly has not been transcribed. But Judge, I, given the circumstances, we can wrap this case up tomorrow. I realize it's been long and slow, but I – I don't – I just haven't had time to do a legal inquiry into the cases, and I have not seen the case that's been provided to the court, or that the court has located that you referenced earlier.

THE COURT: Well, the court has examined the authorities that have been presented to the court, which is People vs. Gilliam, which is an Atlantic 2d case, 215 A.D. 2d 401, 626 N.Y.S.2d 245; and the Wisconsin case, which is in Fed. Supplement, 571 Fed. Supp. 1236, U.S. vs. Fisher. And I've examined the Religious Freedom Restoration Act, which the court understands has been declared unconstitutional, at least in part.

MR. ROSS: This is correct, your Honor.

THE COURT: And frankly, I think probably the greatest authority that's been given to me of any is U.S. vs. Fisher, and I'm not sure how on point that is. But, you know, I think I've got to use a balancing test under the [p. 1055] circumstances. And I recall that some time way back Mr. Harper indicated to me that the defendant was a Seventh Day Adventist. It was in the other case, and it was – had to be three, four, five months ago, at least. Well, it would be before March.

And as I recall, in here yesterday morning, Thursday morning, before we started, I think that the defendant

was present in the courtroom, and we fully discussed at that point in time about the possibility – and I think the defense counsel expressed the greatest possibility of this case going in to Saturday. And we talked about that, and I asked several questions about, What shall I tell the jury panel about this?

And it ended up with me asking, I believe the question, "Well, can I tell them that we're going to try to get the case tried in two days, but there's a possibility it's going to go into Saturday?"

And everybody said yes, that's – we think that's what you've got to tell them. after that, I took a recess while the jury was being – While the jury panel was being brought in.

I came back to the bench, nobody said anything to me, with the defendant still in the courtroom at that point in time. And we do voir dire, and I went through a lengthy voir dire talking about the length of the case and I asked for [p. 1056] conflicts. I had one lady who told me she was leaving for Ireland Saturday morning.

I think probably counsel – I'm not sure counsel for the State and counsel for the defendant, but I think Mr. Clay asked about conflicts again at some point after I had already requested conflicts.

So we get all finished with that and we do the challenges for cause and we did the preemptory challenges and we pick the jury, and only at that point is this matter brought up for me to look at. I've looked at my docket for next week. I've got a law day on Monday which is impossible.

Mr. Pride I think was asking about Sunday. Well, I am prohibited by Missouri law from holding court – or where evidence is presented on a Sunday. Monday is a law day, Tuesday I've got bench trials set. The next day, Wednesday, I've got a jury trial going again. Next week is, you know, I'm going to be in trial every day, it looks like.

And at this point in time, I've got to balance one interest against the other interest. And consequently, it is my decision that we're going to go ahead and go for a while tonight, and we will go tomorrow.

Court will be in recess while the jury eats. I want you all back by the time the jury finishes eating, which is probably going to be 20 minutes.

(A RECESS WAS TAKEN.)

* * *

[p. 1156] THE COURT: Now, any preliminary matters on behalf of the defense?

MR. ROSS: We would renew a request for a continuance from today, or even after today, in order to allow the defense to obtain the presence of Barbara Schnell, who is under both the State and a defense subpoena. She's a Seventh Day Adventist. She has advised Mr. Crane's office, as well as my office, she would not appear if the trial went in to Saturday.

I would like to make an offer of proof, a brief offer of proof as to what her expected testimony would have been, which is going to be essential to the defense case.

THE COURT: Go ahead.

MR. ROSS: That offer of proof would be that she would testify that she, while employed by MET in May of 1996, made the typed memorandum notations appearing on State's Exhibit 4-A, where it says, "Reinstated through May 27th, 1997," at the direction of David Rachell. Is that accurate?

MR. CLAY: That's accurate, and that's information she told us and she told the prosecuting attorney's office, as it related in the investigative report taken from her and provided to us in discovery.

MR. ROSS: Okay.

MR. CLAY: And she was subpoenaed by the State [p. 1157] and by us.

THE COURT: The request for a continuance will be denied. Any other relief that you're asking the court?

MR. ROSS: Yes, your Honor. We would move for a mistrial then at this time for the lack of an essential witness.

THE COURT: Request for the mistrial will be denied. Are you asking me for any other remedy?

MR. CRANE: Are you asking for a writ of attachment?

MR. ROSS: No, your Honor, we are not asking for any other relief at this time.

THE COURT: In other words, you are not asking me for a writ of attachment?

MR. ROSS: One moment, your Honor.

MR. CRANE: Judge, can I just – hasn't the court –

THE COURT: Just a second.

MR. ROSS: We are asking for a writ of attachment at this time.

THE COURT: So you are indicating to me that the witness has indicated to you all that she is not going to appear today, she is not going to honor her subpoena today?

MR. ROSS: That is correct, your Honor.

MR. CLAY: I think also she told Mr. Haws the [p. 1158] same thing, the investigator for the prosecutor's office. That's my understanding from your conversation with him. Is that not correct?

THE COURT: And it is my understanding that the defense is requesting that I issue a body attachment to be served by the sheriff on her and that she be brought to the Boone County Courthouse today?

MR. ROSS: Yes, your Honor.

MR. CRANE: For the record, this is not a State request.

THE COURT: Mr. Clay, do you all have a form on body attachment that you can do? I'm going to need somebody to get me a form.

Same appearances as on 7-24 and 7-25. Defendant's Motion for a Continuance overruled. Defendant requests body attachment for witness – What's her name?

MR. CLAY: Barbara Schnell, S-C-H-N-E-L-L.

THE COURT: S-C-H-N-E-L-L.

MR. CLAY: Yes, sir.

THE COURT: Body attachment issued. Sheriff ordered to find Barbara Schnell and deliver her to Boone County Courthouse for testimony.

Okay. Now I need a form.

MR. CLAY: Mr. Eufinger is going to go generate something.

[p. 1159] THE COURT: I need a form, and we need to get it to the sheriff right away. And they're going to need a good address on her, where she's located.

MR. CLAY: As best as we can.

* * *

Date Printed: 09-15-1997

EXHIBIT C

SENTENCE AND JUDGMENT
IN THE CIRCUIT COURT OF BOONE
COUNTY COUNTY [sic], MISSOURI

State of Missouri
VS
FARREL GENE PRIDE
108 E. BURK ST.
STURGEON, MO. 65284

Case Number:
CR0197-053923F

Date of Birth: 03-02-1969

Social Security No:
499-02-1829

On SEPTEMBER 15, 1997, KEVIN M CRANE, the attorney for the state, the defendant and the attorney for the defendant, STAN CLAY, appear in Division 1.

On JULY 24, 1997, the defendant is found GUILTY BY JURY to the offenses of

1. FORGERY CLASS C FEL
   Date of Offense:
   03-21-1997

2. FORGERY CLASS C FEL
   Date of Offense:
   03-24-1997

The court informs the defendant of the verdict and asks the defendant whether he has any legal cause to show why judgment and sentence should not be pronounced. The Court finds no legal cause.

The Pre-sentence investigation has been received, filed, and considered.

On the above charges the Court enters the following:

1. FORGERY
On SEPTEMBER 15, 1997, in Division 1
Incarceration in: DEPARTMENT OF CORRECTIONS

For: 4 YEARS

Credit for: TIME SERVED

CONSECUTIVE

AND NOT CONCURRENTLY TO COUNT II. REQUEST FOR 559 REPORT DENIED. APPEAL BOND SET AT $30,000 PER COUNT FOR A TOTAL OF $60,000. REQUEST FOR STAY DENIED.

2. FORGERY
On SEPTEMBER 15, 1997, in Division 1
Incarceration in: DEPARTMENT OF CORRECTIONS

For: 4 YEARS

Credit for: TIME SERVED

CONSECUTIVE

TO COUNT I. SAME AS TO CT I.

On SEPTEMBER 15, 1997, Division 1 of the Court further orders

Crime Victims Compensation Fund: $46.00
To be paid by: 11-15-1997
Supervised by: DEPARTMENT OF CORRECTIONS

Thereafter on SEPTEMBER 15, 1997, Division 1 of the Court orders

The Court advises the defendant of his right to appeal and, if indigent, the right to apply for permission to appeal as a poor person.

The Court further advises the defendant of the right to proceed under RULE 29.15 and examines the defendant as to the assistance of counsel. The Court finds no probable cause to believe counsel has been ineffective. Trial counsel will continue to represent the defendant.

The Circuit Clerk is to deliver a certified copy of this judgment and commitment to the Sheriff of Boone County.

The Sheriff is authorized one deputy to transport the defendant to the Division of Adult Institutions.

GENE HAMILTON
CIRCUIT JUDGE
Division 1

I certify that the above is a true copy of the original judgment and sentence of the Court in the above cause as it appears on record in my office.

Issue Date: 09-15-1997

CHERYL WHITMARSH
CIRCUIT CLERK

BY: _____
Deputy Clerk

I have read or have had read to me the judgment and sentence and conditions set out. I agree to comply with this sentence and any conditions of probation.

_____
Date

_____
Defendant Signature

EXHIBIT D

Missouri Court of Appeals

WESTERN DISTRICT

August 31, 1999

IMPORTANT NOTICE

To: All Attorneys of Record

Re: STATE OF MISSOURI Respondent
vs.
PRIDE, FARREL GENE Appellant

WD54962

Please be advised that Appellant's motion for Rehearing is **OVERRULED** and motion for transfer to Supreme Court is **DENIED**. See Rule 83.03.

Terence G. Lord
Clerk-Docket Attorney

cc: PHILIP KOPPE
RAY SOUSLEY
Local AG
753-5051

EXHIBIT E

Report CZR0004 Date: 1-Nov-1999

Time: 8:52:28AM

Page: 1

MISSOURI JUDICIARY
WESTERN DISTRICT CT OF APPEALS
Case Record

WD54962

STATE OF MISSOURI RES V PRIDE, FARREL GENE APEL

STATE OF MISSOURI Respondent

vs.

PRIDE, FARREL GENE Appellant

STATE OF MISSOURI Respondent

23369 PHILIP M KOPPE, Attorney General
ATTORNEY GENERAL, 3100 BROADWAY, KANSAS CITY, MO64111-0000 Fax (816) 889-5006 (FAXED)

PRIDE, FARREL GENE Appellant

33099 RAY EDWARD SOUSLEY,
Attorney for Appellant

800 WESTPORT RD, KANSAS CITY, MO64111-0000
Fax (816) 753-5051 (FAXED)

Case Type: AP Criminal Appeal Circuit

OFFENSE: FORGERY, SENTENCE DATE: 15-SEP-97, CONFINEMENT: 4 YEARS

OFFENSE: FORGERY, SENTENCE DATE: 15-SEP-97, CONFINEMENT: 4 YEARS

Orig. Entity: BOONE COUNTY CIRCUIT COURT Case Number: CR0197-053923F

Circuit Judge: CLIFFORD EUGENE HAMILTON JR

Filing Fee: Filing Fee Paid

* * *

20-Sep-1999 Appl for Tranf SC Filed in SC

Filing by: RAY E SOUSLEY
Associated Party: PRIDE, FARREL GENE
28-Oct-1999 Denied

29-Oct-1999 Case Disp- Opin & Mandate Sent

Status

29-Oct-1999 Case Disp- Opin & Mandate Sent

EXHIBIT F

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

STATE OF MISSOURI,	)	
Plaintiff,	)	**Case No.**
vs.	)	**CR197-053923F**
FARREL GENE PRIDE,	)	
Defendant.	)	

MOTION FOR NEW TRIAL

(Filed Aug. 20, 1997)

COMES NOW Defendant, Farrel Gene Pride, by and through counsel, and moves the Court, pursuant to Supreme Court Rule 29.11, for a new trial in this cause. In support of this Motion, Defendant refers the Court to the accompanying Suggestions in Support.

Respectfully submitted,

ROSS, EUFINGER & SOUSLEY

By: /s/ Gregory E. Eufinger, Jr.

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and

/s/ Stan Clay
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ATTORNEYS FOR DEFENDANT

**IN THE CIRCUIT COURT OF
BOONE COUNTY, MISSOURI**

STATE OF MISSOURI,	)	**Case No.**
Plaintiff,	)	**CR0197-053923F**
	)	
vs.	)	
FARREL GENE PRIDE,	)	
	)	
Defendant.	)	

SUGGESTION IN SUPPORT OF MOTION FOR NEW TRIAL

(Filed Aug. 20, 1997)

COMES NOW Defendant, Farrel Gene Pride, by and through counsel, and states the following in support of his Motion for New Trial:

On May 19, 1997, Defendant was arraigned before this Court in this cause on an Information charging Defendant with two counts of Forgery, class C felonies. Jury trial commenced in this Court on July 24, 1997 and, on July 26, 1997, the jury returned verdicts of guilty on both counts.

In support of his Motion for New Trial, Defendant alleges that the trial court erred in the following respects:

* * *

5. The trial court erred in denying Defendant's request to adjourn the trial after evidence was presented on Friday, July 25, 1997 until Monday, July 28, 1997, on the basis of Defendant's religious beliefs, in violation of the 1st Amendment to the United States Constitution, because there was no compelling state interest in holding court on Saturday, July 26, 1997 and Defendant was prejudiced in that two defense witnesses were unavailable to testify on Saturday, July 26, 1997, because of their religious beliefs.

After the jury was selected on Thursday, July 24, 1997, defense counsel informed the Court that Defendant and most of the defense witnesses were Seventh Day Adventists, and that their religious beliefs prohibited participation in court proceedings on Saturdays, which is the sabbath according to their religious beliefs. The court stated then and, at the close of evidence on Friday night, July 25, that it would hold Court of [sic] Saturday, July 26, 1997 and did, in fact, hold Court on that Saturday. One of the Defendant's witnesses, Barbara Schnell, who is a Seventh Day Adventist, disobeyed a subpoena properly served upon her and failed to appear at trial to testify on behalf of Defendant.

Defendant testified that, as a Seventh Day Adventist, members of his faith had a sincere belief that participation in court proceedings on Saturday was in violation of their religious beliefs. There was no evidence offered by the State to refute this testimony. Assuming, **arguendo,**

the sincerity of Defendant's religious belief, the 1st Amendment would not prohibit holding court on Saturday if if the Court had a compelling interest in holding Court on Saturday, and holding Court on Saturday was the least restrictive alternative for reaching that interest, **United States v. Fisher**, 571 F.Supp. 1236, 1241 (S.D.N.Y. 1984). The only interest cited by the Court was the Court's schedule the following week. In addition, the Court stated that, when questioned by the Court during voir dire, none of the jurors objected to holding Court on Saturday, although the jury was not asked if any of them would be unable to return the next week. In a case virtually identical to this case, the New York Supreme Court, Appellate Division, held that the trial court's schedule was was [sic] not a compelling interest and that the Court's schedule could have been adjusted to accommodate the Defendant's 1st Amendment interests, **People v. Gilliam**, 626 N.Y.S.2d 245 (App.Div. 1995). In this case there is nothing in the record to establish that the Court had a compelling interest in holding court on Saturday or that holding court on Saturday was the least restrictive alternative to reaching the Court's compelling interest.

Defendant was impermissably forced to choose between appearing in Court on Saturday, July 26, 1997, and testifying or adhering to his religious beliefs. In addition, Defendant's wife, Valerie Pride, and mother, Hilda Pride, both of whom testified on behalf of Defendant, were also impermissably forced to make the same choice, which greatly affected their appearance and demeanor at trial, and caused substantial prejudice to

Defendant. Because there was no compelling state interest in holding court on Saturday, July 26, 1997, Defendant's rights under the First Amendment to the United States Constitution were violated and the Court should grant Defendant a new trial.

* * *

EXHIBIT G

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
Respondent,	)	WD No. 54962
vs.	)	
FARREL GENE PRIDE,	)	
Appellant.	)	

IN THE CIRCUIT COURT OF MISSOURI
BOONE COUNTY, DIVISION I
Honorable Gene Hamilton, Judge

STATE OF MISSOURI,	)	
Plaintiff,	)	Case No.
vs.	)	CR0197-053923
FARREL GENE PRIDE,	)	
Defendant.	)	

RECORD ON APPEAL – TRANSCRIPT

VOLUME II – PAGES 797 – 1551

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MR. DANIEL ROSS
800 West 47th Street
Kansas City, Missouri 64112
Attorneys for Defendant

* * *

[p. 1541] SENTENCING

September 15, 1997

* * *

THE COURT: 53923, State versus Pride.

Mr. Crane, Mr. Eufinger, Mr. Clay. Do you care to be heard on your Motion For New Trial?

MR. CLAY: The motion will be submitted on the suggestions that were filed with it.

THE COURT: Okay. State appears by Prosecuting Attorney Crane. Defendant appears in person and by Counsel Stan Clay and Greg Eufinger. Defendant's Motion for New Trial submitted without argument and overruled.

* * *

EXHIBIT H

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

Respondent,

vs.

FARREL GENE PRIDE,

Appellant.

WD Case No. 54962

APPELLANT'S BRIEF

Respectfully submitted,

ROSS, EUFINGER & SOUSLEY

Ray E. Sousley MO Bar #33099
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Kansas City, Missouri 64111-3145
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ATTORNEYS FOR APPELLANT

VII. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR AN ADJOURNMENT OF THE TRIAL FROM FRIDAY, JULY 25, 1997, TO MONDAY, JULY 28, 1997, BASED UPON APPELLANT'S RELIGIOUS BELIEFS AS A SEVENTH DAY ADVENTIST THAT SATURDAY IS THE SABBATH DAY, BECAUSE THERE WAS NO COMPELLING STATE INTEREST IN CONDUCTING COURT PROCEEDINGS ON SATURDAY, JULY 26, 1997, IN THAT APPELLANT'S RELIGIOUS BELIEFS WERE SINCERE AND NO PREJUDICE TO THE STATE WOULD RESULT FROM SUCH AN ADJOURNMENT.

The Constitution of the State of Missouri and the First Amendment to the Constitution of the United States of America provide that all citizens are afforded the right to worship their God in accordance with their individual religious beliefs. It was uncontroverted in the present case that the Appellant is, and was at the time of trial, a devout Seventh Day Adventist, whose Sabbath commenced on Friday at sundown, and continued until Saturday at sundown. (Tr. 1014, lines 3-15). The trial court herein was apprised of the Appellant's beliefs prior to the commencement of the trial and again immediately prior to the giving of the oath to the chosen jury members. (Tr. 462, line 16 through 463, line 12). The court refused to continue the case and/or to adjourn on Friday and reconvene on Monday, citing scheduling problems (Tr. 1056, lines 7-21).

In ***People v. Gillian*** **[sic], 215 A.D.2d 401, 626 N.Y.S.2d 245 (1995),** the defendant, a Muslim, appealed his conviction based upon the court's refusal to adjourn

his trial from Thursday until Monday to accommodate the Muslim Sabbath, which is Friday. In that case, the state's expert was expected to be on vacation the next week, and the trial court rejected the defendant's request for a continuance stating: "I can't give you tomorrow off because of the schedule . . . I can't accommodate you". ***Gillian* [sic], supra** at 401. The appellate court reversed stating, "the Appellant's request for an adjournment to attend religious services was improperly denied in that no compelling state interest was shown (cf. ***People v. Williams*, 197 A.D.2d 401, 602 N.Y.S.2d 377** [denial of adjournment during jury deliberations was necessary to ensure fair trial])."

In the instant case the trial court's only stated reason for refusing to adjourn until Monday was the court's schedule. (Tr. page 1056, lines 20-21). The court made no showing that there was a compelling state interest in holding court on Saturday.[1] In ***United States of America v. Fisher*, 571 F.Supp. 1236 (S.D.New York 1983)**, the court reiterated the two part test in weighing the state's interest against a defendant's first amendment rights:

> "[W]hen the freedom to act in accordance with one's religious convictions comes into conflict with a state's efforts to advance some legitimate and compelling interest, then, as the Supreme Court has made clear, the asserted state interest

---

[1] The court held the jurors until 7:15 p.m. on Thursday, July 24, 1997; until 9:00 p.m. on Friday, July 25, 1997; and until 7:13 p.m. on Saturday, July 26, 1997, at which time deliberations were commenced. The jury returned a verdict of guilt on both counts at 10:42 p.m. on Saturday, July 26, 1997. (L.F. page 18).

> must be weighed against the individual's interest. Presented with such a conflict, a court must undertake the delicate task of determining (a) whether the state's purpose is sufficiently compelling, and (b) whether the manner chosen to achieve such a goal has been tailored with sufficient respect for those whose religiously grounded conduct may conflict with the state's purpose, such that any resulting burden on religious conscience is warranted. ***Gillette v. United States*, 401 U.S. 437, 461-62 [91 S.Ct. 828, 842, 28 L.Ed.2d 168] (1971); *Braunfield v. Brown*, Supra, 366 U.S. at 603 [81 S.Ct. at 1146]; *Prince v. Massachusetts*, 321 U.S. 158, 166 [64 S.Ct. 438, 442, 88 L.Ed. 645] (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 [60 S.Ct. 900, 903, 84 L.Ed. 1213] (1940) [parallel citations omitted].** *Africa*, **542 F.Supp. at 228** (emphasis added).

In this case, not only was the Appellant's exercise of religion unfairly infringed upon by the Court's demanding trial schedule and refusal to adjourn on Saturday, but the court's action also had a direct impact on Appellant's ability to present his case to the jury. Appellant served a trial subpoena on his former employee, Barbara Schnell, also a Seventh Day Adventist. (Tr. 1156, lines 4-7). Ms. Schnell refused to appear at trial and a writ of body attachment was ordered but service of it was unsuccessful. (Tr. 1156, lines 8-10; 1158, lines 4-8). The expected testimony of Schnell was an important piece of Appellant's defense as illustrated in the transcript at page 1156, lines 15-19. Clearly the trial court's interest in its schedule must take a back seat to the Appellant's exercise of his religious beliefs as well as the presentation of his defense.

There was no showing that the State's interest was so compelling as to outweigh the Appellant's religious beliefs. For the foregoing reasons, the convictions must be reversed.

EXHIBIT I

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
Respondent,	)	**Case No. WD 54962**
	)	**Opinion Filed:**
vs.	)	**June 30, 1999**
FARREL GENE PRIDE,	)	
Defendant.	)	

MOTION FOR REHEARING AND/OR TRANSFER TO THE MISSOURI SUPREME COURT

COMES NOW Appellant, by and through counsel, and moves the Court for its Order, pursuant to Supreme Court Rules 30.26 and 83.02, granting Appellant a rehearing before this Court and/or transfer of this cause to the Missouri Supreme Court. In support of this Motion, Appellant refers the Court to the accompanying Suggestions in Support, which state the grounds on which Appellant is seeking a rehearing and/or transfer to the Missouri Supreme Court and which are adopted and incorporated herein by this reference.

Respectfully submitted,

ROSS, EUFINGER & SOUSLEY

By: /s/ Ray E. Sousley
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ATTORNEYS FOR APPELLANT

EXHIBIT J

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
Respondent,	)	**Case No. WD54962**
	)	
vs.	)	**Opinion Filed:**
FARREL GENE PRIDE,	)	**June 30, 1999**
	)	
Appellant.	)	

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING AND/OR TRANSFER TO THE MISSOURI SUPREME COURT

COMES NOW Appellant, by and through counsel, and in support of his Motion for Rehearing pursuant to Rule 30.26 respectfully states that this Court has overlooked and/or misinterpreted material matters of law and/or fact regarding points I through VII, and IX of Appellant's Brief, or, in the alternative, pursuant to Rule 83.02, Appellant requests this Court order transfer to the Missouri Supreme Court because of issues of general interest and importance concerning points I through VII and IX of Appellant's Brief. No relief is requested concerning point VIII of Appellant's Brief.

In further support Appellant more specifically states:

* * *

V. Denial of Weekend Adjournment Request for Religious Reasons (Point VII of Appellant's Brief). This court should grant Appellant a rehearing and/or transfer to the Missouri Supreme Court because it overlooked/misinterpreted material matters of law in upholding the

trial court's denial of Appellant's request to adjourn trial from sundown on Friday evening, July 25, 1997, until the following Monday, based upon his religious beliefs as a Seventh Day Adventist. This court has further misinterpreted the U.S. Supreme Court's opinion in ***City of Boerne v. Flores*, 521 U.S. 507, 138 L.Ed.2d 624 (1997)** in holding the "compelling interest test" inapplicable. This court indicated that the "compelling interest test" was no longer applicable after RFRA (42 USC subsection 2000bb, *et seq.*) (1993) was held unconstitutional by ***Boerne*, supra.** This court then upheld the trial court's action as a valid application of a "neutral, generally applicable law" sanctioned by ***Boerne*, supra.** This court has misinterpreted material law because ***Boerne*** clearly held otherwise: the "compelling interest test" is still valid under ***Boerne*** where the trial court undertakes a *discretionary* decision to hold extraordinary weekend court sessions over a Free Exercise objection, as in the case at bar. See ***Boerne*, supra, at 635,** which cites with approval both ***Department of Human Resources v. Smith*, 494 U.S. 872 at 884, 889, (1990)** and ***Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963).**

Additionally, the Court overlooked material law and fact when it considered Appellant's alleged "delay" in raising the Free Exercise issue in reaching its decision. There is no legal precedent supporting the conclusion that this "delay" is a relevant consideration under the ***Sherbert*** "compelling interest" test (as set forth in ***Boerne***) or if considered as a "neutral, generally applicable law". Second, the Court overlooked material fact in finding that Appellant occasioned any meaningful "delay" by the timing of his reminding the trial court of his religious conflict with weekend court sessions. Prior to trial, the court

had been informed of the conflict between Appellant's religious beliefs and weekend court sessions (Tr. 1015: 23-through 1016:7; 1055: 1-5). Appellant reminded the trial court of his religious conflict with weekend court sessions at the first recess after the court informed the venire panel of a possible Saturday court session, and before the jury was sworn. The trial court itself, when reminded of Appellant's beliefs prior to swearing the jury stated there was no need to take up Plaintiff's Free Exercise objections at that time until it was clear that the trial would not conclude by Friday afternoon (Tr. 462: 8-9). It would appear this court has overlooked these material facts as well as misinterpreted ***Boerne*, supra**, in finding that the timing of Appellant's Free Exercise objection was a valid factor to consider in denying Appellant's request for weekend adjournment. This is also an issue of general interest and importance to the legal community and the public in that it requires an interpretation of ***Boerne*, supra**, and has direct impact on Free Exercise of religion.

* * *

EXHIBIT K

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	**Circuit Court No.**
Plaintiff/Respondent,	)	**CR197-053293F**
	)	**Court of Appeals No.**
vs.	)	**WD 54962**
FARREL GENE PRIDE,	)	**Supreme Court**
	)	**No. _____**
Defendant/Appellant.	)	
	)	**Court of Appeals,**
	)	**Western District**
	)	**Circuit Court for**
	)	**Boone County**

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion ___ or after opinion __X__

[Please complete all of the following that are applicable:]

The date the record on appeal was filed
April 30, 1998

The date the Court of Appeals opinion was filed
June 30, 1999

The date the motion for rehearing was filed
July 15, 1999

and ruled on
August 31, 1999

The date the application for transfer was filed in the Court of Appeals
July 15, 1999

and ruled on
August 31, 1999

List every party involved in the case, indicate the position of the party in the circuit court (e.g., Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g.,

Appellant or Respondent), and indicate the name and address of the attorney of record for each party. *List first the parties applying for transfer and place a check mark in the space following to indicate each party applying for transfer.*

Party	Attorney
Farrel Gene Pride X Defendant/Appellant	Ray E. Sousley ROSS, EUFINGER & SOUSLEY 800 Westport Road Kansas City, MO 64111-3145
State of Missouri _ Plaintiff/Respondent	Philip M. Koppe Missouri Attorney General's Office 3100 Broadway, Suite 609 Kansas City, MO 64111

APPLICATION FOR TRANSFER AND SUGGESTIONS IN SUPPORT OF APPLICATION FOR TRANSFER

QUESTIONS OF GENERAL INTEREST AND IMPORTANCE

1. Did the trial court, in overruling Appellant's motion for adjournment on Friday afternoon to allow Appellant and a material witness to observe their Sabbath as Seventh Day Adventists and in holding trial on Saturday, violate Appellant's rights: (a) to compel the attendance of a subpoenaed witness under the Sixth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, and to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, where the witness had made

an exculpatory statement concerning Appellant to the State and the trial court knew that, because of her beliefs as a Seventh Day Adventist, she stated that she would not appear for trial on Saturday, and (b) to free exercise of religion under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 5 of the Missouri Constitution by forcing Appellant, a Seventh Day Adventist, to forgo observing his Sabbath on Saturday in order to testify in his behalf?

SUGGESTIONS IN SUPPORT OF TRANSFER

Question Number One:

On July 21, 1997, the State furnished Appellant a copy of a statement taken from a former employee of Appellant, Barbara Schnell, which disclosed information favorable to Appellant. Appellant sought a continuance so as to depose Ms. Schnell prior to trial. The trial court denied the continuance. Appellant made a second request for continuance on July 23, 1997, the day before trial. The trial court again denied the request.

The trial of this matter commenced on Thursday, July 24, 1997 and was held through Friday evening, July 25, and through the day and evening of Saturday, July 26, 1997. On Thursday, at a recess during voir dire, before the jury was sworn, after hearing the trial court advise the venire panel that the trial could continue into Friday evening and possibly into Saturday, counsel for Appellant reminded the court that appellant was a Seventh Day Adventist and his religious faith forbade him from attending trial after sundown Friday evening or on Saturday. Appellant also reminded the trial court that several

of his witnesses were Seventh Day Adventists and that they would likewise not be able to participate in a trial conducted on Saturday because of their religious beliefs. The court indicated that it would wait until Friday afternoon to see how the trial was progressing before taking up Appellant's religious hardship objection.

On Friday afternoon, after it became apparent that the trial would not conclude by the end of the business day on Friday, Appellant asserted a formal, on-the-record objection on the grounds of religious hardship. The trial court determined that its interest in maintaining its schedule the following week necessitated the weekend trial and outweighed Appellant's interest in observing his Sabbath. Appellant then chose to appear at trial on Friday evening and on Saturday in order to testify in his own defense, thereby forgoing the observance of his Sabbath.

Because the trial court had not accommodated his request for a continuance to take Ms. Schnell's deposition, Appellant subpoenaed Ms. Schnell, who was herself a Seventh Day Adventist. Ms. Schnell refused to honor the subpoena for Saturday because of her religious beliefs. The Boone County Sheriff was unable to serve an order of body attachment upon Ms. Schnell.

In *State v. Gailes*, 428 S.W.2d 555 (Mo. 1968), a trial court, faced with the absence of a subpoenaed witness for the defense, granted an 18 hour recess to the defendant to attempt to find her and ultimately permitted the defendant to read testimony from a preliminary hearing into the record when the continuance did not result in production of the witness. Because of these circumstances and

attempts to accommodate the defendant, this Court found that the trial court did not violate due process.

Here, the trial court made no effort to accommodate the religious beliefs of the subpoenaed witness. A continuance until Monday, while perhaps disruptive of the trial court's docket, nevertheless would have given Appellant the benefit of the testimony of a relevant and material witness whose religion demanded that she not appear at a trial on Saturday. The application of a reasonable balancing test that would weigh the free exercise provisions of the state and federal constitutions and Appellant's right to due process against the trial court's schedule would surely have produced an accommodation of Appellant's request to adjourn the trial until Monday and a fair trial.

Under the circumstances previously described, the trial court forced Appellant to choose between attending trial, perhaps without the testimony of witnesses he had subpoenaed or observing his Sabbath.

On appeal, Appellant argued that Article I, Section 5 of the Missouri Constitution and the First and Fourteenth Amendments to the United States Constitution required the trial court to find the existence of a compelling state interest before it held court on Friday evening and Saturday over a religious hardship objection of a defendant who was an observant Seventh Day Adventist. Of particular relevance in the present matter is the Missouri Constitution's guarantee that "no person shall, on account of his religious persuasion or belief, . . . be disqualified from testifying", *Mo. Const., Article I, Section 5*. However, this guarantee is tempered by the further provision that "this

section shall not be construed to . . . justify practices inconsistent with the good order, peace or safety of the state", *Id.* In support of his argument, Appellant cited the "compelling interest" test as set forth in ***Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963).**[1] The Court of Appeals denied this point, stating that the United States Supreme Court, in striking down the Religious Freedom Restoration Act in ***City of Boerne v. Flores*, 138 L.Ed. 2d 624 (1997)**, held that the compelling interest test was generally inapplicable.

Appellant respectfully suggests that the Court of Appeals erred in its interpretation of *Flores* and Missouri Constitution. The *Sherbert* standard was partially set aside by the court in ***Employment Division of Oregon v. Smith*, 494 U.S. 872, 108 L.E.2d 876, 110 S.Ct. 1595 (1990)**, where the Supreme Court held that the Free Exercise clause did not guarantee a religion-based exemption to a facially neutral law of general applicability. However, the *Smith* court went on to state that, in contrast to a "neutral law of general applicability, where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason. Furthermore, the *Sherbert* test, as modified by *Smith*, was not struck down by the *Flores* court but, rather, still applies "where the State has in place a system of individual exemptions," *City of Boerne*

---

[1] In *Sherbert*, the Supreme Court set forth the "compelling interest standard" which provides that government intrusions on religious practice are acceptable only to further a public interest of the highest order; and only by the least intrusive means available.

v. Flores, supra, at 635. It is Appellant's position that the trial court's decision to hold court on Friday evening and Saturday over the objection of an observant Seventh Day Adventist was a "system of individual exemptions" to which the compelling interest standard is still applicable. Such a conclusion is harmonious with, if not compelled by, the specific guarantees of the Missouri Constitution's religious freedom clause, Article I, Section 5. Lastly, Appellant believes that the convenience to the trial court in not having to alter its future schedule to finish a trial does not constitute a compelling public interest which justifies interference with a defendant's weekend observance of his Sabbath under either the Missouri or United States Constitutions. See ***People v. Gilliam*** **626 N.Y.S.2d 245 (App. Div. 1995)** where the New York Court of Appeals, when presented with virtually the identical issue, held that the trial court's "schedule" was not a compelling interest.

This case is of general interest and importance to the bar and judiciary of Missouri because there is no Missouri case law directly on point. The trial courts of this state and members of the bar need guidance from this court as to what test is to be used by the trial court when presented with a conflict between a defendant's religious beliefs and the Court's trial schedule. For the above-stated reasons, Appellant respectfully urges the Court to accept transfer of this case in order to provide this needed guidance.

* * *

EXHIBIT L

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

Respondent,

vs.

FARREL GENE PRIDE,

Appellant.

WD Case No. 54962

Appeal from the Circuit Court of Boone County,
Missouri, 13th Judicial Circuit, Division I
Honorable Gene Hamilton, Judge

APPELLANT'S REPLY BRIEF

(Filed Mar. 1, 1999)

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

VI. THE TRIAL COURT ERRED IN NOT ADJOURNING THE TRIAL FROM FRIDAY, JULY 25, 1997 TO MONDAY JULY 28, 1997 BASED ON APPELLANT'S RELIGIOUS BELIEF BECAUSE THERE WAS NO COMPELLING STATE INTEREST IN HOLDING COURT ON SATURDAY, JULY 26, 1997.

The State argues that Appellant was not prejudiced by the trial court's failure to adjourn the trial of this cause from Friday, July 25, 1997 to Monday, July 28, 1997, based upon Appellant's religious belief as a Seventh Day Adventist that Saturday is the Sabbath Day, even though the only reason given by the trial court for failure to do so was the trial court's schedule (Tr. 1056). The State does not cite any authority in support of its argument that the Appellant must show prejudice in order to obtain relief on these grounds. Rather, the correct test, as set forth in Appellant's Brief from ***United States v. Fisher*, 571 F.Supp. 1236 (S.D.New York 1983)**, and ***Gillette v. United States*, 401 U.S. 437, 461-62 (1971)**, focuses on the nature of the State's interest, whether it is sufficiently compelling to override the Appellant's First Amendment interest, and whether the course of action chosen by the trial court was tailored with sufficient respect for Appellant's religious beliefs. The trial court in this case did not consider anything other than the Court's schedule the next week. This same course of conduct by the trial judge was specifically condemned in *Fisher*. The only "compelling state interest" cited by the State in its Brief was its interest in seeing that the trial came to a prompt and expeditious conclusion (the State curiously believes that an additional day of trial on Monday instead of Saturday would not be prompt and expeditious, although it does

not state why this would be so). There in [sic] nothing in the record which would establish that this state interest would not be accomplished by adjourning the trial for one day, a Saturday, to accommodate Appellant's religious beliefs.

The State also argues that Appellant's religious beliefs were not sincere, yet cites nothing in the record in support of this argument. In fact, the record establishes quite the contrary (Tr. 1013-1021): Appellant testified that, rather than stay at home on the Sabbath as the State argues, Appellant and his wife took their children to church (Tr. 1015). Appellant also testified that, for his entire life, he had observed Saturday as the Sabbath (Tr. 1014). There is no evidence in the record to support the State's argument that Appellant's beliefs were anything other than sincere. The State also argues that the trial needed to be finished on Saturday because adjournment until Monday may have had a "severe impact on their ability to remember the testimony and evidence" (State's Brief, p. 51). This argument is absurd, and there is absolutely nothing in the record to support this argument, nor is there any reason given as to why the jury would have such difficulties is [sic] this case, as opposed to any other case.

EXHIBIT M

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, Respondent,	)	
vs.	)	Case No. WD54962
FARREL GENE PRIDE, Appellant.	)	

APPELLANT'S SUPPLEMENTAL MEMORANDUM TO POINT VII

Appellant believes that, in order for the State to have conducted judicial proceedings in connection with Appellant's trial in this cause from sundown on Friday, July 25, 1997 to sundown on Saturday, July 26, 1997, over Appellant's objection, the State had to show a compelling interest in holding such proceedings, as set forth by the United States Supreme Court in ***Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963)**. Apellant, his wife and one of his witnesses, Barbara Schnell, are Seventh Day Adventists, and Appellant testified that his religious beliefs forbade him and his witnesses from participating in judicial proceedings on the Sabbath, which was from sundown on Friday night to sundown on Saturday night, and his objection was based upon these beliefs. The test to be aplied under those circumstances, as set forth in ***Sherbert***, is consistent with the Supreme Court's later ruling in ***Dept. Of Human Resources v. Smith*, 494 U.S. 872, 108 L.Ed. 2d 876, 110 S.Ct. 1595 (1990)**, and with the test set forth by the Missouri Supreme Court in ***Penner v. King***,

695 S.W.2d 887, 890 (Mo. 1985) and this Court in ***Walton v. Walton*, 789 S.W.2d 64, 66 (Mo. App. W.D. 1990)**. Lastly, Appellant believes that the trial court erred in ruling that the State's interest in holding trial Friday night and Saturday in order to maintain the trial court's schedule outweighed Appellant's First Amendment interest.

It is clear from ***Smith, supra***, that, when an individual's First Amendment claim to free exercise of his religion clashes with an "across the board criminal prohibition on a particular form of conduct", the "compelling government interest" test from ***Sherbert v. Verner, supra***, is inapplicable, ***Dept. of Human Resources v. Smith, supra*, at 889**. However, the *Smith* court identifies a particular circumstance where the *Sherbert* test remains applicable, and Appellant believes that circumstance exists in this case. *Sherbert* and its progeny involved appeals from unemployment benefit decisions, and the Supreme Court held that *Sherbert* stands for the proposition that "where the State has in place a system of individual exemptions, then it may not refuse to extend that system to cases of 'religious hardship' without compelling reason", ***Dept. Of Human Resources v. Smith, supra*, at 889**.

In the present matter, Appellant reminded the Court on Thursday, July 24, 1997, before the jury was sworn that he was a practicing Seventh Day Adventist and that attending trial on Friday, July 25, 1997 after sundown and on Saturday, July 26, 1997, was contrary to his religious beliefs (Tr. 462, lines 16-25; 463, lines 6-9; 464, lines 7-8). The trial court was also aware, prior to the commencement of the trial, that Appellant was a Seventh Day Adventist (Tr. 1055, lines 1-5). On Friday evening, July 25,

1997, Appellant requested an adjournment of the proceedings until the following Monday, and specifically informed the Court that attending trial on Friday evening and Saturday would be a violation of "the Fourth Commandment" and against his conscience (Tr. 1015, lines 5-15; ,1019, lines 1-3). Appellant provided testimony regarding the sincerity of his beliefs (Tr. 1013, line 20 through 1014, line 16) and testified that a Saturday trial would result in the unavailability of one or more of his witnesses who were Seventh Day Adventists and had indicated that they would not testify in court on Saturday due to their similar religious beliefs (Tr. 1020, lines 2-25).

Late in the afternoon of Friday, July 25, 1997, the trial court stated that it balanced the competing interests of the State and Appellant, apparently based upon a test it derived from ***United States v. Fisher*, 571 F.Supp. 1236 (S.D.N.Y. 1983)**, and decided that it would hold court on Friday evening and Saturday, and denied Appellant's request for adjournment (Tr. 1054, line 13 through 1056, line 21). In applying its balancing test, the only substantive interest identified by the trial court was as follows:

> I've looked at my docket for next week. I've got a law day on Monday which is impossible. Mr. Pride was asking about Sunday. Well I am prohibited by Missouri law from holding court – or where evidence is presented on a Sunday. Monday is a law day, Tuesday. I've got bench trials set. The next day, Wednesday, I've got a jury trial going again. Next week is, you know, I'm going to be in trial every day, it looks like. And at this point in time, I've got to balance one interest against the other interest. And consequently, it is my decision that we're going to go

> ahead and go for a while tonight, and we will go tomorrow (Tr. 1056, lines 10-21).

In this case, the trial court exercised its discretion to control its own docket when it chose to hold extraordinary sessions of court on Friday after sunset and on Saturday. This discretion of the trial court to control its own schedule regarding the allowance of, and timing of, adjournments is, at its essence, a "system of individual exemptions" to which the ***Sherbert*** compelling governmental interest test should apply. In addition, the application of the ***Sherbert*** test is wholly consistent with Missouri case law interpreting the Missouri constitutional provisions regarding free exercise of religion, ***Penner v. King, supra,*** and ***Walton v. Walton, supra***. In ***Penner,*** the Missouri Supreme Court held that the state may justify an inroad upon religious liberty only by showing that "the regulation is the least restrictive means of achieving a compelling state interest", ***Penner v. King, supra,*** **at 890,** in holding that the state had a compelling interest in requiring an individual to provide a Social Security number on his driver's license. Similarly, this Court in ***Walton v. Walton, supra,*** **at 67,** citing ***Penner,*** used identical language in affirming the appellant's conviction for contempt of court in failing to pay court-ordered maintenance and attorney's fees.

While the trial court may have applied a "balancing test" derived from ***Fisher,*** it is not clear that the trial court correctly applied the "compelling state interest" test consistent with ***Sherbert*** and ***Penner, supra***. Further, the trial court's ruling directly contradicted the holding in ***People v. Gilliam,*** **626 N.Y.S.2d 245 (App. Div. 1995),** in which the appellate court held that the trial court's

schedule was not a compelling state interest when balanced against a very similar free exercise of religion claim. At any rate, Appellant believes that the trial court erred in failing to use a compelling interest standard or erred in finding any interest of the State sufficiently compelling to outweigh Appellant's free exercise of religion interest.

It should be beyond legitimate dispute that the State interest in maintaining its schedule the following week by holding court on Friday evening after sunset and on Saturday is slight in comparison to the infringement upon Appellant's right to free exercise of his sincere religious beliefs. The State had a readily available and less restrictive means for accomplishing the purpose of efficient administration of justice, namely, adjourning the trial until the following Monday and finishing it at that time. While we all know that trial courts have busy schedules, it is also common knowledge that trials often take longer than the parties or the trial court believes they will take, and trial courts often have to modify their schedules in order to finish trials. Appellant believes in this case that the accommodation which he requested was slight and was, in fact, no more than what normally occurs with trials throughout the state of Missouri.

Respectfully submitted,

ROSS, EUFINGER & SOUSLEY

By: _____

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by United States mail, postage prepaid, this 18th day of March, 1999, to:

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Ray E. Sousley

EXHIBIT N

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	) **Circuit Court**
Plaintiff/Respondent,	) **No. CR197-153293F**
	) **Court of Appeals**
vs.	) **No. WD 54962**
FARREL GENE PRIDE,	) **Supreme Court No. 81988**
Defendant/Appellant.	) **Court of Appeals, Western District**
	) **Circuit Court for Boone County**

JOINT SUGGESTIONS OF *AMICI CURIAE* IN SUPPORT OF TRANSFER

COME NOW the American Civil Liberties Union, Anti-Defamation League General Conference of Seventh-day Adventists, and American Jewish Committee, and pursuant to Supreme Court Rule 84.05(f), with consent of all parties, move this Court to order the case transferred to the Missouri Supreme Court, and in support thereof, state:

INTEREST OF *AMICI*

The American Civil Liberties Union is a nonpartisan, nonprofit organization founded in 1920 with 275,000 members nationwide, whose purpose is to defend the Bill of Rights. As part of its mission, the ACLU has participated, either as counsel or as *amicus*, in numerous cases supporting the free exercise of religion.

The Anti-Defamation League (ADL) is a national, nonprofit organization founded in 1913 to advance good

will among Americans of all creeds and races. ADL believes that these goals are best served through the separation of church and state and free exercise of religion. The ADL has filed *amicus* briefs in numerous cases supporting the free exercise of religion. The American Jewish Committee is a national organization founded in 1906 to protect the interests of Jews, and secure the religious freedom of Americans of all faiths. It has participated as *amicus* in many cases supporting the free exercise of religion.

The General Conference of Seventh-day Adventists represents over 41,000 congregations of Seventh-day Adventists worldwide. Central to the faith is refraining from secular activity on the Sabbath, from sundown Friday through sundown Saturday.

STATEMENT OF ISSUES

Did the trial court's order denying appellant's motion to adjourn on Friday afternoon and in holding trial on Saturday, appellant's Sabbath, violate appellant's right to the free exercise of religion under the First and Fourteenth Amendments to the United States Constitution and Art. 1, Section 5 of the Missouri Constitution?

PRELIMINARY STATEMENT

Farrel Gene Pride went to trial on forgery charges in July 1997. *State v. Pride*, 1999 Mo. App. LEXIS 894 *7. Before the jury had been sworn, appellant reminded the

court that he was a Seventh Day Adventist who celebrated the Sabbath between sundown Friday and sundown Saturday and would have a conflict if trial were held on Saturday. *Id.* at *8. By Friday afternoon, it became clear that the trial would not conclude before sundown. *Id.* The court denied appellant's motion to adjourn the trial until Monday leaving him to choose between observing his Sabbath and exercising his right to testify in his own defense. Appellant appeared, though one of his fact witnesses refused. The Missouri Court of Appeals, Western District, affirmed the decision.

I. The court should determine the standard to be applied under the Missouri Constitution to conflicts between a defendant's religious beliefs and a court's discretion to set its schedule.

There is conflict over what standard applies to religious freedom cases under the Missouri Constitution. The Court should accept transfer because of the need to determine the standard where a governmental rule or regulation conflicts with an individuals [sic] religious beliefs or practices. Specifically, does the order interfere with Missouri's guarantee that "no person shall, on account of his religious persuasion or belief . . . be disqualified from testifying?" **MO. CONST., ART.** I, §5.

On appeal, appellant argued that the Missouri Constitution required the court to find a compelling interest before it could hold court on Friday evening and Saturday over the objections of a Seventh Day Adventist who observed his Sabbath at that time. The court did not address state law, but instead analyzed the case under federal case law. Missouri's free exercise clause seemingly

grants broader protections than its federal counterpart, but no Missouri case law sets the boundaries of the state's free exercise provisions. At the least, Missouri's constitution can provide no less protection than provided by the federal free exercise clause, and *amici* contend that the Missouri Court of Appeals misapplied the federal standards in this case (see pt. II,). It is unclear how the Supreme Court's decision in *Boerne v. Flores*, 521 U.S. 507 (1997), will impact analysis of the Missouri provision, and there is no case law addressing this. Missouri courts and members of the bar are without sufficient guidance on this issue.

In Missouri, the controlling free exercise case is *Penner v. King*, 695 S.W.2d 887 (Mo.banc 1985). In that case, addressing whether the mandatory disclosure of social security numbers on driver's licenses violated the rights of applicants who found it inconsistent with their religious beliefs, the court balances the government's interest against the burden on religious freedom. At one point, the court states that it "must uphold a statute if there is any valid basis on which the legislature could have acted," *Id.* at 889, but then invokes a compelling interest test, stating that an infringement of religion must be justified by "showing that the regulation is the least restrictive means of achieving a compelling state interest." *Id.* at 890.

Lower state courts are at odds over which standard to apply. Some state appellate courts have adopted a compelling interest test (*see State v. Davis*, 745 SW2d 249 (Mo. App. 1998), interpreting *Penner* to require a compelling interest), while others have followed the Eighth Circuit's interpretation of federal constitution (see *Adams v.*

Moore, 861 S.W.2d 680 (Mo. App. 1983), adopting a "reasonableness" test in a case involving religious freedom of a prisoner).

Thus, there are conflicting standards on this important constitutional issue, supporting the need for transfer. Missouri's constitution may be more protective than the federal and the Missouri Supreme Court in *Penner* seems to advocate the broader protection. State courts and counselors need guidance as to what test should be applied. This court's review can help delineate those instances when "human authority can control or interfere with the rights of conscience." Mo. Const. Art. I, §5.

II. The Court of Appeals misapplied the federal standard and improperly determined that the compelling interest test does not apply to a conflict between a defendant's religious beliefs and a court's discretionary schedule.

The court should accept transfer because of the importance of determining whether a court order requiring a defendant to attend trial on Saturday, his Sabbath, constitutes interference with his right to free exercise of religion under the First and Fourteenth Amendments. U.S. CONST. Amends. I, XIV. The Appeals Court misapplied the standards set forth in *Boerne v. Flores*, 521 U.S. 507 (1997); *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990); and *Sherbert v. Verner*, 374 U.S. 398 (1963).

The Court of Appeals quoted *Boerne* for the proposition that states need not show a compelling interest to apply neutral, generally applicable laws to religious practices. The court then concluded that *Boerne* rendered the

compelling interest test generally inapplicable, applied rational basis scrutiny and held that the judge's actions did not violate the First Amendment. While the language from *Boerne* is correct, the application of rational basis scrutiny to the exceptional act of holding court on Saturday is not. *Amici* respectfully suggest that the Court of Appeals erred in its interpretation of the constitutional standard. While the Supreme Court has narrowed the scope of the compelling interest test set forth in *Sherbert*, the test has not been obliterated entirely.

The *Sherbert* compelling interest test was partially set aside by *Smith, supra.* but *Smith* made clear that where the state has in place a system of individual exemptions, it may *not* refuse to extend that system to cases of religious hardship without a compelling reason. Likewise, the compelling interest test was not struck down entirely by *Boerne*, but rather, still applies "where the State has in place a system of individual exemptions," *Boerne*, 318 L.Ed. at 635. In this case, there is a system to consider individual requests for variance.

Holding court on Saturday is the exception, not the rule. Mo.R.Civ.P. 44.01 states that Saturdays, Sundays and legal holidays are not considered in the computation of court time. The court's normal hours of operation are Monday through Friday unless an exception is made by order of court. The system of exemptions in this case is the judge's ability to consider individual requests for variance. Contrary to the appellate court's decision in this case, *Smith* and *Boerne* uphold the proposition that when the government's discretionary interests collide with an individual's right to exercise his faith, the government must demonstrate a compelling interest.

This case presents this court with the opportunity to clarify an important question concerning the free exercise of religion. Because the Court of Appeals misapplied the federal standard, and because of the importance of the applicability of these standards in Missouri, the Missouri Supreme Court should accept transfer.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the court order this case transferred to the Missouri Supreme Court.

Respectfully submitted,

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AMERICAN JEWISH COMMITTEE

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by United States Mail, postage prepaid, this 29th day of September, 1999, to:

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